U.S. Department of Labor

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

BRB No. 17-0629 BLA

DENNIS H. EVERSOLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY	)	DATE ISSUED: 12/12/2018
	)	
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-BLA-05259) of Administrative Law Judge Alice M. Craft, 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 subsequent claim filed on February 12, 2013.[1]

[1] Claimant filed his first claim on February 7, 2001. Director's Exhibit 1 at 475. In a Decision and Order issued on August 13, 2003, Administrative Law Judge Daniel J.

The administrative law judge credited claimant with twenty years of underground coal mine employment, as stipulated by the parties, and found that he has a totally disabling respiratory or pulmonary impairment. The administrative law judge therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), and established a change in an applicable condition of entitlement.[2] She further found that employer failed to establish rebuttal of the presumption and awarded benefits accordingly.

On appeal, employer challenges the administrative law judge's determination that claimant established a change in an applicable condition of entitlement by invoking the Section 411(c)(4) presumption. Employer also maintains that the administrative law judge erred in finding that it failed to rebut the presumption and in finding that the date for commencement of benefits is February 2013.[3] Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

Roketenetz found that claimant established a totally disabling respiratory impairment, but failed to establish the existence of pneumoconiosis. Accordingly, Judge Roketenetz denied benefits. Director's Exhibit 1 at 55. Claimant appealed and the Board affirmed the denial. *Eversole v. Shamrock Coal Co.*, BRB No. 03-0809 BLA (July 7, 2004) (unpub.); Director's Exhibit 1 at 7. Claimant did not further pursue this claim.

[2] Under Section 411(c)(4) of the Act, claimant is entitled to a 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] Approximately eleven months after filing its brief in support of the petition for review, and eight months after the briefing schedule closed, employer filed a Supplemental Authority for Reassignment and New Hearing before the Office of Administrative Law Judges (Employer's Supplemental Authority) requesting a new hearing before a different administrative law judge. Employer's Supplemental Authority at 1-5. Employer relies on *Lucia v. SEC*, 585 U.S. , 2018 WL 3057893 (June 21, 2018), which held that the manner in which certain administrative law judges are appointed violates the Appointments Clause of the Constitution, Art. II §2, cl. 2. Employer's Supplemental Authority at 2-33. The Director, Office of Workers' Compensation Programs (the Director), responds that employer waived this argument by failing to raise it in its opening brief. We agree with the Director. Because employer did not raise the Appointments Clause issue in its opening brief, it forfeited the issue. *See Lucia*, 2018 WL 3057893 at *8 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a

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).

I. Change in an Applicable Condition of Entitlement

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). We reject employer's argument that claimant cannot establish a change in an applicable condition of entitlement by operation of the Section 411(c)(4) presumption. Employer's Brief at 6. The administrative law judge determined that claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis.[5] Decision and Order at 2. She then found that claimant established a change in this condition because he invoked the Section 411(c)(4) and employer failed to rebut it. Decision and Order at 15, 21-22. The administrative law judge accurately found that invocation of the Section 411(c)(4) presumption established, subject to rebuttal, that claimant has pneumoconiosis and is totally disabled by it. Accordingly, the administrative law judge properly determined

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party's] case"); *see also Island Creek coal Co. v. Wilkerson*, F.3d , 2018 WL 6301617 at *1 (Dec. 3, 2018) (Appellants must raise any challenge to a district court or administrative decision in their opening brief.); *Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[5] In a miner's claim, the elements of entitlement under 20 C.F.R. Part 718 consist of the existence of pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; total respiratory or pulmonary disability; and that the total respiratory or pulmonary disability is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

that claimant satisfied his burden of demonstrating a change in an applicable condition of entitlement under 20 C.F.R. §725.309(c). *See Eastern Assoc. Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511-512 (4th Cir. 2015) (The Section 411(c)(4) presumption may be used to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309, including the existence of pneumoconiosis.); *Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 794-95 (7th Cir. 2013) (The existence of pneumoconiosis and disability causation may be established by invocation of the Section 411(c)(4) presumption for the purpose of demonstrating a change in an applicable condition of entitlement at 20 C.F.R. §725.309.). We therefore affirm the administrative law judge's finding.

II. 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 he has neither legal nor clinical pneumoconiosis,[6] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer disproved the existence of clinical pneumoconiosis, but failed to disprove either legal pneumoconiosis or total disability causation.

Employer contends that the administrative law judge did not adequately weigh all of the medical evidence from the prior claim, particularly the opinions of Drs. Dahhan and Broudy. Employer's Brief at 10-11. Employer asserts that because the Board did not disturb the crediting of their opinions that claimant's disabling impairment is not related to coal dust exposure in the denial of the initial claim, those credibility determinations constitute the law of the case. *Id.*

[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).

Contrary to employer's argument, the administrative law judge permissibly found that because the prior claim was filed in 2001 and finally denied in 2004, the evidence submitted in support of claimant's subsequent 2013 claim is entitled to greater weight as it more accurately represents claimant's current respiratory condition. *See Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163, 1167 (6th Cir. 1997) (In light of the progressive nature of pneumoconiosis, the administrative law judge's reliance on the more recent evidence was proper.); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988); Decision and Order at 20. We therefore affirm the administrative law judge's finding that the evidence from the 2001 claim is "substantially out of date and entitled to little weight." Decision and Order at 20.

A. Legal Pneumoconiosis

To disprove that claimant has 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." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012). The administrative law judge considered the opinions of employer's experts, Drs. Jarboe and Rosenberg. Dr. Jarboe opined that claimant's ventilatory impairment is attributable to his heavy cigarette smoking habit, bronchial asthma and morbid obesity, rather than coal dust exposure.[7] Director's Exhibit 18; Employer's Exhibits 4, 5. While Dr. Rosenberg initially observed that the results of claimant's pulmonary function study were consistent with an impairment related to coal dust inhalation, he concluded that the impairment was caused by multiple non-occupational factors, particularly claimant's morbid obesity.[8] Employer's Exhibits 3, 6.

[7] Dr. Jarboe examined claimant on August 8, 2013 and stated his findings in a report dated September 4, 2013. Director's Exhibit 18. Dr. Jarboe reiterated his opinion that these non-occupational factors are significant contributors to claimant's airflow obstruction and impairment in depositions taken on September 11, 2014 and November 3, 2016. Employer's Exhibits 4, 5.

[8] Dr. Rosenberg examined claimant on February 20, 2014. Employer's Exhibit 3. In a report dated March 3, 2014, Dr. Rosenberg opined that claimant's FEV1/FVC pattern demonstrated on his pulmonary function study was consistent with legal pneumoconiosis, but after considering the results of additional diagnostic testing, he concluded overall that "the overwhelming factor responsible for the pattern specific to [claimant] is his marked obesity," which Dr. Rosenberg characterized as "morbid." *Id.* Similarly, during his deposition on November 1, 2016, Dr. Rosenberg testified, "I looked at the pattern of impairment and generally, if you look at data in the medical literature of what the pattern

The administrative law judge found that the opinions of Drs. Jarboe and Rosenberg were neither persuasive nor well-reasoned, and were therefore entitled to little weight. Decision and Order at 19-20. Thus, she determined that employer did not rebut the Section 411(c)(4) presumption by establishing that claimant does not have legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A). *Id.* at 19-20.

Employer contends that the administrative law judge erred by focusing "exclusively" on Dr. Jarboe's comments regarding claimant's heavy cigarette smoking, rather than the "multiple non-occupational factors" upon which he based his opinion. Employer's Brief at 15. Employer maintains that Dr. Jarboe specifically explained why claimant's pulmonary condition was caused primarily by bronchial asthma and obesity, and the administrative law judge's conclusory citation to the preamble does not support her rejection of Dr. Jarboe's opinion. We disagree.

The administrative law judge permissibly determined that Dr. Jarboe's opinion "is inconsistent with the premise[s] underlying the regulations" in two respects. Decision and Order at 19. First, the administrative law judge rationally found that Dr. Jarboe's view that coal dust inhalation is not as harmful as cigarette smoking conflicts with the view expressed by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions that "coal dust causes clinically significant [chronic obstructive pulmonary disease] even in the absence of smoking." *Id.*; 65 Fed.Reg. 79,920, 79,940 (Dec. 20, 2000). The administrative law judge also reasonably concluded that Dr. Jarboe's view was at odds with the DOL's statement in the preamble that "coal dust and smoking have additive effects and cause damage to the lungs by similar mechanisms." *Id.* Finally, she accurately observed that although Dr. Jarboe attributed claimant's disabling impairment to asthma, chronic bronchitis, and morbid obesity, he did not definitively explain why claimant's twenty years of coal dust exposure did not contribute, along with these other factors, to his impairment. Decision and Order at 19; Director's Exhibit 18; Employer's Exhibits 4, 5. The administrative law judge therefore provided valid rationales for discrediting Dr. Jarboe's opinion that claimant does not have legal pneumoconiosis. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Decision and Order at 19. We therefore affirm the administrative law judge's finding that Dr. Jarboe "did not offer any creditable explanation why he excluded coal dust as a contributing factor to [claimant's] obstructive disease." Decision and Order at 19.

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of legal [coal workers' pneumoconiosis] looks like, it generally is a symmetrical reduction of the FEV1 and the FVC such that the ratio is preserved and that's generally what we're seeing here, but [claimant] has multiple confounding factors which excludes the fact that this relates to legal [coal workers' pneumoconiosis]." Employer's Exhibit 6 at 8.

Employer further contends that the administrative law judge erred in discrediting Dr. Rosenberg's opinion. Employer alleges that like Dr. Jarboe, Dr. Rosenberg clearly "explained why he did not diagnose legal pneumoconiosis . . . in his report and deposition." Employer's Brief at 15. Employer further asserts that the administrative law judge's rejection of Dr. Rosenberg's opinion was "conclusory" and therefore violates the Administrative Procedure Act.[9] *Id*. at 16. We reject employer's arguments.

The administrative law judge rationally found that Dr. Rosenberg's opinion, that the pattern of impairment demonstrated on claimant's pulmonary function study "*probably* . . . does not represent a condition related to past coal dust exposure," lacked the specificity necessary to disprove the existence of legal pneumoconiosis. Employer's Exhibit 3 at 7 (emphasis added); *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Decision and Order at 20. She further permissibly determined that Dr. Rosenberg attributed claimant's disabling impairment to "multiple confounding factors" but failed to adequately explain why claimant's coal dust exposure did not also contribute to his impairment. Decision and Order at 20; *see Kennard*, 790 F.3d at 668; Employer's Exhibits 3, 6. We therefore affirm the administrative law judge's finding that Dr. Rosenberg's opinion is entitled to little weight.

As the administrative law judge's credibility determinations are rational and supported by substantial evidence, we affirm her finding that the opinions of Drs. Jarboe and Rosenberg are insufficient to rebut the presumed fact of legal pneumoconiosis. Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Morrison*, 644 F.3d at 480.

B. Disability Causation

Employer argues that the administrative law judge erred in finding that employer failed to rebut the presumed fact of disability causation pursuant to 20 C.F.R. §718.305(d)(1)(ii). Employer's Brief at 12-14. We disagree. The administrative law judge permissibly found that her discrediting of the opinions of Drs. Jarboe and Rosenberg on legal pneumoconiosis rendered their opinions that claimant's disabling impairment was not

[9] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

caused by pneumoconiosis of little probative value. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 20-21. We therefore affirm her finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Accordingly, we further affirm the award of benefits. *See Morrison*, 644 F.3d at 480; Decision and Order at 21.

III. Date for the Commencement of Benefits

Once entitlement is established, the date for the commencement of benefits is generally determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-184 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 1119 n.4 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990). In a subsequent claim, the date for the commencement of benefits is determined pursuant to 20 C.F.R. §725.503, with the additional rule that no benefits may be paid for any time period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

The administrative law judge determined that although claimant filed his current claim in February 2013, he was already totally disabled when Drs. Dahhan and Broudy examined him in conjunction with his prior claim filed in February 2001.[10] Decision and Order at 22. After considering the new medical opinions filed in the current claim, the administrative law judge further determined that the record demonstrates that claimant is disabled, and noted that she credited the new opinions of physicians who attributed claimant's disability to pneumoconiosis over the contrary opinions. *Id.* Thus, finding that there was no new evidence establishing that claimant was not disabled due to pneumoconiosis, the administrative law judge awarded benefits payable as of July 1, 2005, one year from the issuance of the Board's affirmance of the denial of the prior claim. *Id.*

[10] The administrative law judge indicated that, in Judge Roketenetz's adjudication of the prior claim, he found that claimant established a totally disabling respiratory impairment. Decision and Order at 22; Director's Exhibit 1 at 55.

Employer asserts that the administrative law judge's finding is in error, as there is no evidence postdating the denial of the prior claim that can be credited to establish an onset date of total disability due to pneumoconiosis in the present claim. Employer's Brief at 17-18. Employer further argues that although the administrative law judge determined that the evidence associated with the current claim was sufficient to establish a change in one of the applicable conditions of entitlement, this evidence did not establish that claimant was totally disabled due to pneumoconiosis "before the filing of [his] subsequent claim and no such evidence was cited or relied upon by [the administrative law judge]." *Id*. Employer's arguments have merit.

It is undisputed that the record contains no medical evidence demonstrating when claimant first became totally disabled due to pneumoconiosis.[11] Moreover, employer accurately observes that the record contains no medical evidence demonstrating that claimant became totally disabled due to pneumoconiosis after the denial of his prior 2001 claim but before the filing of the current 2013 claim.[12] Because the medical evidence of record does not reflect the date upon which claimant became totally disabled due to pneumoconiosis, we modify the administrative law judge's decision to reflect that benefits are payable from February 2013, the month in which claimant filed his subsequent claim. 20 C.F.R. §725.503(b).

[11] While the administrative law judge acknowledged Dr. Baker's March 23, 2013 opinion that claimant is totally disabled due, in part, to legal pneumoconiosis, this evidence does not establish when claimant first became totally disabled due to pneumoconiosis. *See Green v. Director, OWCP*, 790 F.2d 1118, 1119 n.4 (4th Cir. 1986); Decision and Order at 10; Director's Exhibit 14.

[12] Employer correctly maintains that medical opinions diagnosing total disability due to pneumoconiosis in the prior claim, which was finally denied because claimant did not establish the existence of pneumoconiosis, are considered to be misdiagnoses and, therefore, cannot establish the date of onset of total disability due to pneumoconiosis in the current claim. *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358 (4th Cir. 1996) (*en banc*), *rev'g* 57 F.3d 402 (4th Cir. 1995).

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed, as modified to reflect a commencement date of February 2013 for the payment of benefits.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge