U.S. Department of Labor

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

BRB No. 18-0062 BLA

DAVID L. McCONNELL Claimant-Respondent v. CHIEF MINING, INCORPORATED and WEST VIRGINIA PNEUMOCONIOISIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/12/2018 DECISION and ORDER

Appeal of the Decision and Order of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2015-BLA-05945) of Administrative Law Judge Scott R. Morris 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 subsequent claim filed on May 13, 2014.[1]

After crediting claimant with at least twenty-eight years of underground coal mine employment,[2] the administrative law judge found that the claimant suffers from 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 Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis.[3] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

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 in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

[1] Claimant filed two previous claims for benefits, both of which were finally denied. Director's Exhibits 1, 2. Claimant's most recent prior claim, filed on October 29, 2009, was finally denied on September 29, 2010 because the evidence did not establish the existence of pneumoconiosis or that claimant had a totally disabling respiratory or pulmonary impairment. Director's Exhibit 2.

[2] The record reflects that claimant's last coal mine employment was in West Virginia. Decision and Order at 3; Hearing Transcript at 14. Accordingly, the Board will apply the law 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).

[3] 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 fifteen or more 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.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*,

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).

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[5] 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.

To establish that claimant does not suffer from legal pneumoconiosis,[6] employer must demonstrate that he does not have a chronic dust disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[7] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v.*

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6 BLR 1-710, 1-711 (1983). Claimant, therefore, established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c) as a matter of law.

[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 that is 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] The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis. Decision and Order at 36.

[7] Employer contends that the administrative law judge improperly required it to establish that no part of claimant's respiratory or pulmonary impairment was caused by coal mine dust exposure, rather than establishing that it was more likely than not that claimant's respiratory or pulmonary impairment was not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.305(d)(1)(i)(A). However, as we explain, *infra*, the administrative law judge permissibly discredited the opinions of Drs. Zaldivar and Castle, taking into consideration the rationale each doctor provided for his medical opinion that claimant's coal mine dust

Keystone Coal Mining Corp., 25 BLR 1-149, 1-1-55 n.8 (2015) (Boggs, J., concurring and dissenting). In evaluating whether employer met its burden, the administrative law judge considered the opinions of Zaldivar and Castle.

Dr. Zaldivar opined that claimant's totally disabling pulmonary impairment is due to asthma, cigarette smoking, obesity, and congestive heart failure, and not coal mine dust exposure. Director's Exhibit 28; Employer's Exhibit 12 at 33-34, 43-44, 70. Dr. Castle opined that claimant's totally disabling pulmonary impairment is due to asthma and tobacco-smoke induced chronic airway obstruction and that coal mine dust exposure did not contribute.[8] Employer's Exhibits Employer's Exhibits 1 at 25; 13 at 46.

The administrative law judge discredited the opinions of Drs. Zaldivar and Castle because he found that their explanations for excluding a diagnosis of legal pneumoconiosis were inconsistent with the regulations and the preamble to the 2001 revised regulations. Decision and Order at 39-43. He also found that their opinions were not adequately reasoned. *Id*.

We reject employer's argument that the administrative law judge erred in discrediting the opinions of Drs. Zaldivar and Castle. Employer's Brief at 9-24. The administrative law judge accurately noted that both doctors relied in part on the partial reversibility of claimant's impairment after the administration of a bronchodilator as a basis to exclude coal mine dust exposure as a cause of claimant's obstructive respiratory

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exposure did not contribute to his impairment. Thus, the administrative law judge's error, if any, in his recitation of the legal standard for rebuttal was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[8] Employer asserts that the administrative law judge should have relied upon "the much more significant smoking histories" that claimant reported in his previous claims. Employer's Brief at 8. However, as discussed, *infra*, the administrative law judge permissibly found employers' physicians' explanations insufficient to establish rebuttal because they failed to adequately explain how they were able to dismiss coal mine dust exposure as impacting claimant's respiratory impairment (i.e. the *physicians* found that coal dust had *no* impact but did not adequately explain on what basis they were able to make this determination in the face of the rebuttable legal presumption to the contrary). Under the circumstances, employer has not shown that utilizing a longer smoking history would have made any difference in the administrative law judge's finding as to the adequacy of their explanations. Consequently, the administrative law judge's error, in any, in understating the extent of claimant's smoking history was harmless. *See Larioni*, 6 BLR at 1-1278.

impairment. Decision and Order at 40, 42; Employer's Exhibits 12 at 24-26; 13 at 31-32. The administrative law judge found, within his discretion, that both failed to adequately explain why the irreversible portion of claimant's pulmonary impairment was not due, in part, to coal mine dust exposure, or why claimant's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of claimant's disabling obstructive pulmonary impairment.[9] *See* 20 C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004).

The administrative law judge also permissibly discredited their opinions because he found that they failed to adequately explain how they eliminated claimant's twenty-eight years of coal mine dust exposure as a contributor to his disabling obstructive pulmonary impairment.[10] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012); *see also Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); Decision and Order at 41-43.

Because the administrative law judge permissibly discredited the opinions of Drs. Zaldivar and Castle,[11] the only opinions supportive of a finding that claimant does not have legal pneumoconiosis, we affirm his finding that employer failed to establish that claimant does not have legal pneumoconiosis. Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by

[9] The administrative law judge accurately noted that claimant's two most recent pulmonary function studies conducted on March 22, 2016 and May 19, 2016 produced qualifying results even after the administration of a bronchodilator. Decision and Order at 10, 40; Claimant's Exhibits 1, 2.

[10] The administrative law judge found that neither Dr. Zaldivar nor Dr. Castle, explained why claimant's coal dust exposure did not contribute to his disabling impairment. Id at 43.

[11] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Zaldivar and Castle, any error he may have made in discrediting their opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Zaldivar and Castle.

establishing that claimant does not have pneumoconiosis.[12] *See* 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether employer rebutted the Section 411(c)(4) presumption 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). He rationally discounted the opinions of Drs. Zaldivar and Castle that claimant's disability is not due to pneumoconiosis because neither doctor diagnosed legal pneumoconiosis, contrary to his finding that employer failed to disprove that claimant has the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 44. Therefore, we affirm the administrative law judge's determination that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

[12] 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).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge