U.S. Department of Labor

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

BRB No. 18-0064 BLA

LARRY ALLEN YOUNG	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 12/17/2018
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 of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

William S. Mattingly and Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2014-BLA-05224) of Administrative Law Judge Timothy J. McGrath 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 claim filed on December 10, 2012.

After crediting claimant with at least nineteen years of underground coal mine employment,[1] 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.[2] 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 filed a limited response, urging the Board to reject employer's contention that the administrative law judge applied an incorrect rebuttal standard.[3]

[1] Claimant's coal mine employment was in Kentucky. Director's Exhibit 3; Hearing Transcript at 25. 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).

[2] 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.

[3] Seven months after filing its brief in support of the petition for review, and four months after the briefing schedule closed, employer moved to permit supplemental briefing addressing the impact of *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (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. Claimant opposes employer's motion and the Director, Office of Workers' Compensation Programs (the Director), responds that employer forfeited the issue 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 waived the issue. *See Lucia*, 138 S.Ct. at 2055 (requiring "a timely

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).

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

Because claimant invoked the Section 411(c)(4) presumption,[4] the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis,[5] 20 C.F.R. §718.305(d)(1)(i), or 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 either.

---

challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, F.3d , No. 18-3147, 2018 WL 6301617 at *1-2 (6th Cir. Dec. 3, 2018) (holding that the employer forfeited its Appointments Clause challenge by failing to raise it in its opening brief). We have considered employer's argument that "exceptional circumstances" should excuse its forfeiture, and conclude that they lack merit. *See Wilkerson*, 2018 WL 6301617 at *2; *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1118 (6th Cir. 1984) (Board authority to address constitutional challenges not questionable because it "performs the identical appellate function previously performed by the district courts" and Congress vested in it "the same judicial power to rule on substantive legal questions as was possessed by the district courts.") (citation omitted); Employer's Motion at 3-7.

[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.*, 6 BLR 1-710, 1-711 (1983).

[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).

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." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. 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 Drs. Tuteur, Selby, and Culbertson.[7]

Dr. Tuteur opined that claimant has a totally disabling respiratory or pulmonary impairment due to chronic obstructive pulmonary disease (COPD)/emphysema caused by cigarette smoking,[8] and not due to coal mine dust exposure. Employer's Exhibit 10 at 6. Dr. Selby opined that claimant has emphysema due to cigarette smoking, as well as asthma aggravated by cigarette smoking. He opined that coal mine dust exposure did not contribute to either disease. Director's Exhibit 12 at 6; Employer's Exhibit 14 at 29-31, 33. Dr. Culbertson diagnosed claimant as having granulomatous disease due to histoplasmosis and emphysema due to smoking, but found that neither was related to his coal mine dust exposure.[9] Claimant's Exhibit 7 at 8-11, 23.

---

[6] The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis. Decision and Order at 27.

[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 reasonably discredited the opinions of Drs. Tuteur, Selby, and Culbertson, taking into consideration the rationale each doctor provided for finding that claimant's coal mine dust exposure did not contribute to his impairment. The standard played no role in the administrative law judge's rationale. 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] Dr. Tuteur opined that claimant's emphysema was also "aggravated by chronic suboptimally treated [gastroesophageal reflux disease]." Employer's Exhibit 10 at 6.

[9] Employer asserts that the administrative law judge should have relied upon "a smaller smoking history." Employer's Brief at 23-24. However, as discussed, *infra*, the administrative law judge permissibly found employers' physicians' explanations

The administrative law judge discredited the opinions of Drs. Tuteur, Selby, and Culbertson 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 28-34. He also found that their opinions were not adequately reasoned. *Id*.

Dr. Tuteur opined that it was possible, but "highly unlikely" that coal mine dust exposure contributed to claimant's COPD. Employer's Exhibit 10 at 5. Citing medical literature, Dr. Tuteur explained that "coal mine dust-induced clinically meaningful [COPD] occurs less than 1% of the time among never smoking miners compared to 20% of the time in person [s] who smoke and never mine." *Id*. The administrative law judge, however, determined that Dr. Tuteur "did not explain why [c]laimant could not be one of the statistically rare individuals who develop obstruction as a result of coal mine dust exposure." Decision and Order at 30. The administrative law judge therefore permissibly found that Dr. Tuteur's opinion was not well-reasoned because it was based on "statistical probabilities," rather than on claimant's specific condition. *Id.*; *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). The administrative law judge also permissibly discredited Dr. Tuteur's opinion because he found that the physician failed to adequately explain how he eliminated claimant's nineteen years of coal mine dust exposure as a contributor to his disabling obstructive pulmonary impairment. *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.

In considering Dr. Selby's opinion, the administrative law judge noted that the doctor attributed claimant's emphysema to cigarette smoking, and not coal mine dust exposure, in part because there was "no evidence of coal dust disease in [c]laimant's lungs" and "no coal macules described in the pathology reports." Decision and Order at 31; Employer's Exhibit 14 at 31. The doctor opined that claimant's x-rays did not show the

---

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 using a longer smoking history would have made any difference in the administrative law judge's finding as to the adequacy of their explanations. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

"right pattern" for obstructive lung disease caused by coal mine dust exposure. *Id.* The administrative law judge permissibly found this reasoning to be inconsistent with the definition of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311-12 (4th Cir. 2012); *see also* 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000) (recognizing that coal mine dust can cause clinically significant obstructive lung disease, even in the absence of x-ray evidence of clinical pneumoconiosis).

The administrative law judge noted that Dr. Selby also eliminated coal mine dust exposure as a cause of claimant's worsening pulmonary function from 2011 to 2013 because the physician alleged "[coal mine dust exposure] wouldn't suddenly jump in here several years after cessation of exposure," and because the decline in pulmonary function testing was "too quick of a decline to be associated with pneumoconiosis." Employer's Exhibit 14 at 23. The administrative law judge permissibly discredited that reasoning as inconsistent with the Department of Labor's recognition that pneumoconiosis is "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 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014); Decision and Order at 30-31.

Finally, the administrative law judge considered Dr. Culbertson's testimony that claimant's COPD was due solely to cigarette smoking. Claimant's Exhibit 7 at 34-35. Dr. Culbertson acknowledged that coal mine dust exposure could be an aggravating factor, but indicated that he did not "see how you could claim that coal dust [exposure] is the cause of the COPD when [claimant's] been a two-pack-a-day smoker for 40 years." *Id.* at 35. The physician testified that claimant's "cigarette smoking alone is an adequate explanation for his COPD . . . ." *Id.* at 40. The administrative law judge permissibly found that Dr. Culberston's opinion did not adequately address the relevant issue: the degree to which claimant's coal mine dust exposure may have also contributed to his obstructive pulmonary impairment. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 33.

Because the administrative law judge permissibly discredited the opinions of Drs. Tuteur, Selby, and Culbertson,[10] the only opinions supportive of a finding that claimant

[10] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Tuteur, Selby, and Culbertson, any error he may have made in discrediting their opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh*

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 establishing that claimant does not have pneumoconiosis.[11] *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. Tuteur and Selby that claimant's disability is not due to pneumoconiosis because neither doctor diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease.[12] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *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). Therefore, we affirm the administrative law judge's determination that employer failed to prove that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis, and affirm the award of benefits. *See* 20 C.F.R. §718.305(d)(1)(ii).

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 their opinions.

[11] 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).

[12] Employer does not contend that Dr. Culbertson's opinion is sufficient to establish that no part of claimant's respiratory or pulmonary total disability was caused by legal pneumoconiosis. Moreover, Dr. Culbertson's opinion regarding the cause of claimant's pulmonary disability, like that of Drs. Tuteur and Selby, is undermined by his failure to diagnose legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *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).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge