U.S. Department of Labor

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

BRB No. 19-0057 BLA

JOHNNY W. BURRELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INCORPORATED-WALTER ENERGY, INCORPORATED/ WARRIOR MET COAL, LLC	)	DATE ISSUED: 12/03/2019
	)	
Employer-Petitioner Self-Insured	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits and Decision and Order on Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

John R. Jacobs and J. Thomas Walker (Maples Tucker & Jacobs, LLC), Birmingham, Alabama, for claimant.

John C. Webb, V and Aaron D. Ashcraft (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits and Decision and Order on Reconsideration (2017-BLA-05183) of Administrative Law Judge Lee J. Romero, Jr., pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on August 20, 2015.[1]

The administrative law judge credited claimant with twenty-three years and eight months of underground coal mine employment based on the parties' stipulation and found he has a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). Therefore, he found claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c) and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] He also found employer did not rebut the presumption and awarded benefits.[3] Further, the administrative law judge denied employer's motion for reconsideration.

On appeal, employer argues the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of

[1] On September 12, 2013, the district director denied claimant's first claim, filed on December 10, 2012, because he failed to establish total respiratory disability. Director's Exhibit 1. Claimant did not take any further action before filing his current claim. Director's Exhibit 3.

[2] 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] Where 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). Because claimant's prior claim was denied because he did not establish total respiratory disability, Director's Exhibit 1, he could meet his burden under 20 C.F.R. §725.309(c)(3) by establishing that element of entitlement.

benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer has filed a reply brief, reiterating its arguments.[4]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's decisions and orders if they are 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).

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish 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

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-three years and eight months of underground coal mine employment, total disability at 20 C.F.R. §718.204(b)(2), a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c), and that he 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 5, 32-36.

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

[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 pulmonary disease or respiratory or pulmonary 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).

[20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found employer failed to establish rebuttal by either method.[7]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, employer must establish claimant does not have a chronic lung disease or impairment "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 Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered the opinions of Drs. Zaldivar, Goldstein, and Barney.[8] Dr. Zaldivar opined claimant does not have legal pneumoconiosis, but has a restrictive impairment related to a prior lung surgery, his ongoing mycobacterium avium infection, and a very mild airway obstruction related to cigar smoking.[9] Director's Exhibit 8. Dr. Goldstein opined claimant has a small amount of obstructive airways disease and a significant restrictive impairment related to the surgical removal of a large portion of his right lung. Director's Exhibit 20. Dr. Barney

[7] The administrative law judge determined employer rebutted the existence of clinical pneumoconiosis, but did not rebut the existence of legal pneumoconiosis. Decision and Order at 41, 44, 45; *see* 20 C.F.R. §718.305(d)(1)(i).

[8] The administrative law judge also considered claimant's treatment records from January 6, 2000 through August 23, 2017. Claimant's Exhibits 4-5. CT scans and PET scans revealed lesions in claimant's lungs that were suspicious for cancer. Claimant's Exhibit 4. On June 26, 2012, claimant underwent a lobectomy for the lower lobe of his right lung. *Id*. at 297-299. Dr. Cerfolio, a thoracic surgeon, opined mycobacterium avium complex (MAC) had infected claimant's right lung. *Id*. at 271. The administrative law judge noted the treatment records demonstrate claimant suffers from chronic obstructive pulmonary disease (COPD), recurring MAC, and an obstructive and restrictive pulmonary impairment. Decision and Order at 44, 45. He further found, however, that no explanation was provided for the cause of claimant's COPD and there was no mention of clinical or legal pneumoconiosis concerning his recurring MAC. *Id*. Finding it "unclear" whether claimant's obstructive and restrictive pulmonary impairment is related to his MAC infection, smoking history "and/or" twenty-three years and eight months of coal dust exposure, the administrative law judge determined employer did not rebut the presumed fact of legal pneumoconiosis based on the treatment records. *Id*.

[9] Dr. Zaldivar opined that claimant's restrictive impairment is unrelated to coal dust exposure. Director's Exhibit 8.

opined claimant's pulmonary impairment is related to his previous lung resection.[10] Director's Exhibit 17. He did not, however, offer an opinion about the potential role of claimant's coal dust exposure as a cause of his respiratory impairment. *Id*. Because Dr. Barney "did not offer any opinion regarding the existence, or lack thereof, regarding legal pneumoconiosis," but only "summarily concluded . . . that Claimant did not have 'pneumoconiosis,'" the administrative law judge found Dr. Barney's opinion not well-reasoned and therefore accorded no weight to it on legal pneumoconiosis. Decision and Order at 41, 43. The administrative law judge determined the opinions of Drs. Goldstein and Zaldivar are persuasive concerning the cause of claimant's restrictive impairment but unpersuasive concerning the cause of his obstructive impairment. *Id*. He discredited the opinions of Drs. Goldstein and Zaldivar on the basis that neither adequately addressed whether claimant's obstructive airway impairment is related to his smoking history and also his coal dust exposure.[11] *Id*. Thus, the administrative law judge found that employer failed to establish the absence of legal pneumoconiosis. *Id*. at 45.

Employer asserts the administrative law judge erred in discrediting Dr. Zaldivar's opinion. Employer's Brief at 3. We disagree. Dr. Zaldivar noted the treatment records he reviewed indicated claimant has chronic obstructive pulmonary disease. Director's Exhibit 8 at 1, 5. He found that claimant's smoking history "probably was accurate" and "resulted" in his very mild airway obstruction. *Id*. at 7. The administrative law judge permissibly determined that although Dr. Zaldivar identified other factors contributing to claimant's impairment, he failed to adequately explain why claimant's coal dust exposure did not also contribute to his obstructive airway impairment. Decision and Order at 43; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013) (administrative law judge rationally discredited opinions of physicians who did not adequately explain why the miner's interstitial fibrosis was not significantly related to, or substantially aggravated by, dust exposure in coal mine employment). We therefore affirm the administrative law judge's finding that Dr. Zaldivar's opinion does not satisfy employer's burden to affirmatively establish the absence of legal pneumoconiosis. 20 C.F.R. §§718.201(b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-159 n.8.

Because the administrative law judge rationally discredited the only medical opinions supportive of employer's burden, we affirm his finding employer did not disprove legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a

[10] In a report dated January 12, 2016, Dr. Barney noted claimant's history of mycobacterium lung infection. Director's Exhibit 9.

[11] Employer does not challenge the administrative law judge's weighing of the treatment records and the opinions of Drs. Barney and Goldstein.

rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Barber v. Director, OWCP*, 43 F.3d 899, 900-01 (4th Cir. 1995). We therefore affirm the administrative law judge's determination employer did not rebut the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis.

Total Disability Causation

The administrative law judge next addressed whether employer established rebuttal by proving "no part" of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. Decision and Order at 45; 20 C.F.R. §718.305(d)(1)(ii). He discredited the opinions of Drs. Zaldivar, Goldstein, and Barney that claimant is impaired solely due to his lung resection. Decision and Order at 45-46. The administrative law judge determined they either did not offer an opinion on the existence of legal pneumoconiosis or opined claimant does not have legal pneumoconiosis, contrary to his determination employer did not disprove the existence of the disease. Their opinions as to disability causation did not show how legal pneumoconiosis played no part in claimant's disability. Consequently, he found that employer failed to establish that "no part" of claimant's disability is due to pneumoconiosis. Decision and Order at 46; Decision and Order on Reconsideration at 10.

Employer argues that "because disability causation and legal pneumoconiosis are separate, independent grounds available under 20 C.F.R. §718.305," the administrative law judge's finding that employer "failed to rebut the presumption under prong (ii) solely because the presumption had not been rebutted under section (i) impermissibly conflated the two separate grounds for rebuttal." Employer's Brief at 4.[12] Contrary to employer's

[12] We note that the administrative law judge considered whether employer rebutted the Section 411(c)(4) presumption under a single subheading entitled "Legal Pneumoconiosis." *See* Decision and Order at 45. The administrative law judge considered the two methods of rebuttal separately, albeit under the same subheading.

After the administrative law judge determined that employer failed to establish rebuttal under either method, he then set forth claimant's burden to establish disability causation on the merits, *see* Decision and Order at 46-47, as opposed to employer's burden on rebuttal of the presumption to establish claimant's disability was not due to legal pneumoconiosis. But doing so was unnecessary and any error by the administrative law judge is harmless, as he had properly considered whether employer established rebuttal of the Section 411(c)(4) presumption by proving "no part" of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see* Decision and Order at 45-46; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

assertion, it was not error for the administrative law judge to rely on his findings that the physicians' opinions employer relied on did not disprove the existence of legal pneumoconiosis when weighing those physicians' opinions regarding disability causation. The administrative law judge rationally found the same reasons he provided for discrediting the physicians' opinions on legal pneumoconiosis also undermined their opinions that claimant's disabling respiratory or pulmonary impairment was not caused by legal pneumoconiosis. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013). Consequently, the administrative law judge rationally discredited the opinions of Drs. Zaldivar, Goldstein, and Barney regarding disability causation.

As the administrative law judge fully explained his reasons for discrediting the opinions of Drs. Zaldivar, Goldstein, and Barney, we reject employer's assertion that he substituted his own opinion for those of the medical experts. Because employer has not asserted any additional error, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by disproving disability causation. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 12.

Because claimant invoked the Section 411(c)(4) presumption and employer did not rebut it, we affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order Granting Benefits and Decision and Order on Reconsideration are affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge