U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0078 BLA

MICHAEL J. SWEENEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL ENERGY, INCORPORATED	)	
	)	DATE ISSUED: 02/20/2015
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Margaret M. Scully (Thompson, Calkins & Sutter, LLC), Pittsburgh, Pennsylvania, for employer.

Jonathan P. Rolfe (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (12-BLA-5169) of Administrative Law Judge Drew A. Swank 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 March 4, 2011.

Applying amended Section 411(c)(4),[1] the administrative law judge noted that the parties stipulated that claimant had twenty-four years and seven months of aboveground coal mine employment.[2] The administrative law judge found that, because all of claimant's coal mine employment took place in conditions substantially similar to those in an underground mine, claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Further, the administrative law judge accepted employer's stipulation that claimant suffers from a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4). The administrative law judge also found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant and the Director, Office of Workers' Compensation Programs, respond in support of the award of benefits.[3]

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).

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[1] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption of total disability due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4).

[2] Claimant's most recent coal mine employment was in Pennsylvania. Director's Exhibit 6. Accordingly, the Board will apply the law of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[3] On December 9, 2014, the Board held oral argument in this case in Pittsburgh, Pennsylvania, to address certain issues raised on appeal. Employer, claimant, and the Director, Office of Workers' Compensation Programs, submitted oral argument briefs in support of their positions.

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis,[4] the burden shifted to employer to rebut the presumption by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," his coal mine employment. 30 U.S.C. §921(c)(4). Under the implementing regulation, employer may rebut the presumption by establishing that claimant does not have either legal or 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 §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.[6]

Employer initially contends that the administrative law judge failed to address whether employer disproved the existence of pneumoconiosis. Employer's Brief at 13. We disagree. The administrative law judge found that employer's physicians, Drs. Fino and Renn, failed to adequately explain how they eliminated coal dust exposure as a cause of claimant's emphysema. Decision and Order at 18. Therefore, contrary to employer's contention, the administrative law judge found that employer failed to establish that claimant does not have legal pneumoconiosis. *See* 20 C.F.R. §§718.305(d)(1); 718.201(a)(2).

In evaluating whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Fino and Renn. During a June 17, 2013 deposition, Dr. Fino testified that a CT scan revealed fairly

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[4] Because employer does not challenge the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (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). "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] In considering whether employer rebutted the Section 411(c)(4) presumption, the administrative law judge combined his discussion of whether employer disproved the existence of pneumoconiosis, with his discussion of whether employer proved that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Decision and Order at 14-18.

extensive emphysema, as well as a "ground glass interstitial abnormality." Employer's Exhibit 11 at 9. Dr. Fino did not address the etiology of claimant's emphysema, but opined that the disease did not contribute to claimant's totally disabling pulmonary impairment. *Id.* at 16. In regard to the ground glass abnormality, Dr. Fino testified that it was "very typical of . . . an idiopathic inflammation of the lungs." *Id.* at 10. Although Dr. Fino initially opined that claimant suffers from usual interstitial pneumonitis,[7] a condition of the general population that is not associated with coal mine dust exposure, the doctor subsequently opined that claimant does not suffer from the disease. *Id.* at 11, 23.

During a May 2, 2013 deposition, Dr. Renn testified that claimant suffers from tobacco smoke-induced emphysema. Employer's Exhibit 9 at 32. Dr. Renn also diagnosed a form of idiopathic interstitial pneumonitis, which he opined was likely "usual interstitial pneumonitis." *Id.* at 20, 32. Dr. Renn testified that claimant's usual interstitial pneumonitis was "very far and away a consequence of tobacco smoking." *Id.* at 32. Dr. Renn specifically opined that claimant's usual interstitial pneumonitis was not caused by coal mine dust exposure. *Id.* at 24-25. Dr. Renn opined that claimant's totally disabling pulmonary impairment was caused by both his emphysema and usual interstitial pneumonitis. Employer's Exhibits 2; 9 at 41-42.

Employer argues that the administrative law judge erred in discrediting the opinions of Drs. Fino and Renn. Employer's Brief at 14. We disagree. The administrative law judge permissibly questioned the opinions of Drs. Fino and Renn, that claimant does not suffer from legal pneumoconiosis, because he found that neither physician adequately explained how he eliminated claimant's twenty-four years of coal mine dust exposure as a source of his emphysema.[8] *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *see also Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 18. As the administrative law judge's basis for discrediting the opinions of Drs. Fino and Renn is rational and supported by substantial evidence, it is affirmed.

Because the administrative law judge permissibly discredited the opinions of Drs. Fino and Renn, we affirm his finding that employer failed to disprove the existence of legal pneumoconiosis. Employer's failure to disprove the existence of legal

[7] Dr. Fino explained that the terms, usual interstitial pneumonitis and idiopathic pulmonary fibrosis, are interchangeable. Employer's Exhibit 9 at 18-19.

[8] As previously noted, Dr. Fino did not address the etiology of claimant's emphysema, while Dr. Renn attributed claimant's emphysema exclusively to cigarette smoking. Employer's Exhibits 9 at 32; 11 at 16.

pneumoconiosis precludes a rebuttal finding that claimant does not suffer from pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1). Accordingly, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.

Upon finding that employer was unable to disprove the existence of pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1). The administrative law judge again considered the opinions of Drs. Fino and Renn. Drs. Fino and Renn opined that claimant's totally disabling pulmonary impairment is due to his usual interstitial pneumonitis, which they characterized as "idiopathic" in nature. Employer's Exhibits 9 at 24, 46; 11 at 12-13.

The administrative law judge initially found that the opinions of Drs. Fino and Renn were "very persuasive," but noted that there were "inconsistencies between their reports." Decision and Order at 18. Specifically, the administrative law judge noted that Drs. Fino and Renn disagreed as to whether claimant suffers from usual interstitial pneumonitis, with Dr. Renn testifying that claimant suffers from usual interstitial pneumonitis, and Dr. Fino ultimately testifying that he does not. *Id.* Additionally, the administrative law judge noted that the doctors disagreed regarding the contribution of claimant's emphysema to his pulmonary impairment. The administrative law judge found that Dr. Fino opined that claimant's emphysema did not contribute to his pulmonary impairment, while Dr. Renn, on the other hand, did not address the contribution of claimant's emphysema to his impairment.[9] *Id.* Finally, the administrative law judge noted that Drs. Fino and Renn "both opined that the etiology of [c]laimant's disabling pulmonary impairment is *idiopathic*." *Id.* The administrative law judge, therefore, found that it "is in relying upon an unknown or idiopathic cause of [c]laimant's pulmonary impairments, along with the other inconsistencies cited *supra*, that their opinions fail to persuasively overcome the [Section 411(c)(4)] presumption." *Id.*

Employer initially argues that the administrative law judge erred in relying upon 20 C.F.R. §718.305(d)(3) to reject the opinions of Drs. Fino and Renn. Employer's Brief at 16. This regulation provides that "[t]he presumption must not be considered rebutted

[9] The administrative law judge accurately noted that Drs. Fino and Renn disagreed as to the role that claimant's emphysema played in causing his pulmonary impairment. However, while Dr. Fino opined that claimant's totally disabling pulmonary impairment was not caused by his emphysema, Employer's Exhibit 11 at 16, Dr. Renn actually contradicted Dr. Fino's opinion, testifying that claimant's totally disabling pulmonary impairment was caused, in part, by his emphysema. Employer's Exhibit 9 at 41-42.

on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin." 20 C.F.R. §718.305(d)(3). Because neither Dr. Fino nor Dr. Renn diagnosed an obstructive lung disease, employer argues that the administrative judge improperly relied upon Section 718.305(d)(3) to reject their opinions. Contrary to employer's characterization of the administrative law judge's decision, the administrative law judge did not rely upon 20 C.F.R. §718.305(d)(3) to reject the opinions of Drs. Fino and Renn. Instead, the administrative law judge found that inconsistencies between the physicians' opinions, and the physicians' reliance upon an idiopathic cause of claimant's pulmonary impairment, diminished the credibility of their opinions. Decision and Order at 18. Although the administrative law judge referenced the language of 20 C.F.R. §718.305(d)(3), it was only in the context of explaining his credibility determination that the doctors' opinions regarding the cause of claimant's disabling pulmonary impairment were not sufficiently persuasive to rebut the presumption. *Id*. at 18 n.12. In fact, the administrative law judge acknowledged that the provision was not applicable, noting that neither Dr. Fino nor Dr. Renn "found evidence of an *obstructive* respiratory or pulmonary disease." *Id.* Therefore, we reject employer's contention that the administrative law judge relied upon 20 C.F.R. §718.305(d)(3) to reject the opinions of Drs. Fino and Renn.

Employer next asserts that the administrative law judge failed to provide an adequate basis for discounting the opinions of Drs. Fino and Renn regarding the cause of claimant's disabling pulmonary impairment. Employer's Brief at 17. We disagree. The administrative law judge explained that he found the opinions of Drs. Fino and Renn unpersuasive because of inconsistencies between their opinions, notably, their disagreement as to whether claimant suffers from usual interstitial pneumonitis, and whether claimant's emphysema contributes to his pulmonary impairment. Decision and Order at 18. Given those inconsistencies in the physicians' reasoning, the administrative law judge found that the doctors' additional reliance upon an unknown or idiopathic cause of claimant's pulmonary impairment rendered their opinions insufficiently persuasive to rebut the presumption. *Id.* Because it is supported by substantial evidence and unchallenged by employer, we affirm the administrative law judge's determination that the opinions of Drs. Fino and Renn contain the above-referenced inconsistencies. Consequently, we hold that the administrative law judge acted within his discretion in finding that the disability causation opinions of Drs. Fino and Renn "fail[ed] to persuasively overcome [the] presumption."[10] Decision and Order at 18; *see Mingo Logan*

[10] Employer argues that the administrative law judge failed to recognize that Dr. Fino is Board-certified in Pulmonary Diseases, in addition to being Board-certified in Internal Medicine. Employer's Brief at 15. Because the administrative law judge permissibly discredited Dr. Fino's opinion based upon the doctor's failure to persuasively explain why claimant's totally disabling pulmonary impairment is not due to pneumoconiosis, the administrative law judge's failure to recognize Dr. Fino's Board-

Coal Co. v. Owens, 724 F.3d 550, 25 BLR 2-339 (4th Cir. 2013). We therefore affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by establishing that claimant's totally disabling impairment did not arise out of, or in connection with, his coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1).

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge properly awarded benefits.

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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certification in Pulmonary Diseases was harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).