U.S. Department of Labor

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

BRB No. 15-0183 BLA

ROY G. BLACKBURN, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTHERN OHIO COAL COMPANY	)	DATE ISSUED: 02/09/2016
	)	
and	)	
	)	
CONSOL ENERGY, INC.	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (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, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits in a Subsequent Claim (2008-BLA-05804) of Administrative Law Judge Larry S. Merck, rendered pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] Based on the filing date of the claim, and his determinations that claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] Because claimant established total disability pursuant to 20 C.F.R. §718.204(b), an element of entitlement that he failed to prove in his prior claim, the administrative law judge also found that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Further, the administrative law judge determined that employer did not establish rebuttal of the Section 411(c)(4) presumption. Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge applied an incorrect legal standard in considering whether employer established rebuttal of the presumption under Section 411(c)(4), and that he erred in weighing the evidence relevant to rebuttal. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the

[1] Claimant filed an initial claim for benefits on April 10, 1985, which was denied by the district director on June 17, 1985, because claimant did not establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a second claim on June 11, 2001, which was denied by the district director on October 22, 2002, because claimant did not establish any of the requisite elements of entitlement. *Id*. Claimant took no further action until he filed the current subsequent claim on October 30, 2006. Director's Exhibit 3.

[2] Under Section 411(c)(4), 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), as implemented by 20 C.F.R. §718.305.

administrative law judge applied the correct legal standard in finding that employer failed to rebut the Section 411(c)(4) presumption.[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.[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).

In order to establish rebuttal of the Section 411(c)(4) presumption of total disability due to pneumoconiosis, employer must affirmatively establish that claimant does not have either legal[5] or clinical[6] pneumoconiosis, or that "no part of the miner's

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established: at least twenty-four years of coal mine employment, all of which was underground, "except for about six to eight months;" a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2); a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309; invocation of the Section 411(c)(4) presumption. Decision and Order at 12, 24-25; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

[5] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The regulation also provides that "a disease 'arising out of coal mine employment' includes 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).

[6] Pursuant to 20 C.F.R. §718.201(a)(1), clinical pneumoconiosis is defined as:

> [T]hose 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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis,

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, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp*., BRB No. 13-0544 BLA, slip op. at 10-11 (Apr. 21, 2015) (Boggs, J., concurring and dissenting). In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge noted that employer relied on the opinions of Drs. Altmeyer and Zaldivar, each of whom attributed claimant's respiratory condition to asthma, unrelated to coal dust exposure. Decision and Order at 27. The administrative law judge found that Dr. Altmeyer diagnosed asthma as claimant's primary lung condition, and that he attributed "around 10 percent" of claimant's respiratory obstruction to coal dust exposure. *Id*. The administrative law judge found that, while Dr. Altmeyer testified that coal dust exposure does not cause asthma, he failed to adequately explain why claimant's twenty-four years of coal dust exposure did not significantly contribute to, or substantially aggravate, his respiratory condition. *Id*. The administrative law judge also found that Dr. Zaldivar's opinion, that claimant does not have legal pneumoconiosis, was not well-reasoned.[7] *Id*. at 29.

Employer maintains that, to the extent the administrative law judge cited the preamble to the 2001 revised regulations as support for his credibility determinations, and rejected the opinions of Drs. Altmeyer and Zaldivar for expressing "the medical fact that asthma is not caused by coal dust exposure," the administrative law judge improperly substituted his opinion for that of the medical experts. Employer's Brief in Support of Petition for Review at 8, 12. Employer also contends that the administrative law judge's analysis is flawed because the regulations and preamble do not "establish an etiological relationship between coal mine dust exposure and asthma." *Id*. at 9.

Based on our review of the administrative law judge's Decision and Order, we conclude that the administrative law judge acted within his discretion in finding the opinions of Drs. Altmeyer and Zaldivar to be insufficient to disprove the existence of legal pneumoconiosis. As noted by the administrative law judge, the Department of

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> massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

[7] Because employer failed to disprove the existence of legal pneumoconiosis, the administrative law judge did not address whether employer disproved the existence of clinical pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i). Decision and Order at 29, n. 14.

Labor (DOL), in the preamble to the 2001 revised regulations, recognized that the "term 'chronic obstructive pulmonary disease' (COPD) includes three disease processes characterized by airways dysfunction: chronic bronchitis, emphysema, and *asthma*." 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000) (emphasis added); *see* Decision and Order at 27. The DOL further found that "the overwhelming scientific and medical evidence demonstrates that coal mine dust exposure can cause obstructive lung disease." 65 Fed. Reg. 79,994 (Dec. 20, 2000). Because claimant invoked the Section 411(c)(4) presumption, employer was required to affirmatively establish that claimant's obstructive respiratory impairment, in the form of asthma, was not significantly related to, or substantially aggravated by, coal mine dust exposure. *See* 20 C.F.R. §718.201(b); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, BLR (4th Cir. 2015).

The administrative law judge correctly noted that Dr. Altmeyer "concluded that [c]laimant's asthma is not related to his extensive underground coal mine dust exposure" and "stated that coal dust does not cause asthma." Decision and Order at 27, *citing* Employer's Exhibits 2, 13 at 11. However, the administrative law judge permissibly found that Dr. Altmeyer failed to explain why claimant's asthma was not substantially aggravated by his coal mine dust exposure. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-451 (6th Cir. 2013) *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 27.

We also reject employer's assertion that the administrative law judge did not properly address whether Dr. Altmeyer's opinion is sufficient to disprove the existence of legal pneumoconiosis, as defined at 20 C.F.R. §718.201. Employer contends that the administrative law judge placed "a higher burden upon Dr. Altmeyer" and required that he "'rule out' any role by coal mine dust in the [c]laimant's pulmonary condition." Employer's Brief in Support of Petition for Review at 6-8. Contrary to employer's contention, the administrative law judge acknowledged that Dr. Altmeyer indicated that he "could not exclude 'some portion of [claimant's] airways obstruction from the inhalation of coal dust in the coal mines'" and that Dr. Altmeyer indicated that it is only "perhaps 10 percent" or "slight." Decision and Order at 27, *quoting* Employer's Exhibit 12 at 26, 28. However, the administrative law judge did not reject Dr. Altmeyer's opinion on the issue of legal pneumoconiosis because he could not completely rule out coal dust exposure as playing a role in claimant's impairment. Decision and Order at 27-28. Rather, the administrative law judge required Dr. Altmeyer to persuasively "explain how [c]laimant's asthma was not 'significantly related to, or substantially aggravated by' his approximately [twenty-four] years of underground coal mine employment." *Id.*, *quoting* 20 C.F.R. §718.201(a)(2). Therefore the administrative law judge applied the correct legal standard on rebuttal. *See Minich*, BRB No. 13-0544 BLA, slip op. at 10-11.

In considering Dr. Zaldivar's opinion, the administrative law judge observed correctly that, during his deposition, Dr. Zaldivar explained that coal dust exposure cannot produce asthma. Decision and Order at 28; Employer's Exhibit 14. When "asked if there could be tie in [sic] between asthma and coal dust exposure," Dr. Zaldivar stated that he "cannot think of anything in the coal mines that could possibly be causing asthma in most individuals by far and certainly not in this individual. There are no participating factors." Decision and Order at 28-29, *quoting* Employer's Exhibit 14 at 49. The administrative law judge found that in his medical report and deposition, Dr. Zaldivar "failed to define what he meant by participating factors[,] and except for his own speculation[,] did not address why [c]laimant's asthma was not 'significantly related to, or substantially aggravated by' [c]laimant's approximately [twenty-four] years of underground coal mine employment." Decision and Order at 29, *quoting* 20 C.F.R. §718.201(a)(2); *Ogle*, 737 F.3d at 1074, 25 BLR at 2-451; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Employer argues, however, that in discrediting Dr. Zaldivar's opinion, the administrative law judge impermissibly focused "upon two insignificant words in the 131 page transcript rather than upon the substance of the physician's testimony." Employer's Brief in Support of Petition for Review at 12-13. Employer points out that Dr. Zaldivar used the words "precipitating" and "participating" in different parts of his deposition testimony, and that "[e]ither Dr. Zaldivar misspoke or the court reporter misheard the testimony." *Id*. Contrary to employer's argument, we see no error in the administrative law judge's finding that Dr. Zaldivar's rationale for why claimant does not have legal pneumoconiosis was not sufficiently explained, as Dr. Zaldivar did not define or explain either term during his deposition. *See Ogle*, 737 F.3d at 1074, 25 BLR at 2-451; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *see also* Decision and Order at 19-21, 28-29; Employer's Exhibit 14. Based on our review of the totality of Dr. Zaldivar's deposition testimony, the administrative law judge permissibly concluded that it was not persuasive to satisfy employer's burden of proof. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

The administrative law judge, as the trier-of-fact, has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and assign those opinions appropriate weight. *See Ogle*, 737 F.3d at 1074, 25 BLR at 2-451; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to affirmatively establish that

claimant does not have legal pneumoconiosis and, thus, failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).

Additionally, with regard to the second method of rebuttal, the administrative law judge rationally determined that the opinions of Drs. Zaldivar and Altmeyer were not credible to establish that no part of the miner's total respiratory or pulmonary disability was due to legal pneumoconiosis, as neither physician diagnosed the disease. *See Ogle*, 737 F.3d at 1074, 25 BLR at 2-451-52; *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-474 (6th Cir. 2013); *see also Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 30. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in a Subsequent Claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge