U.S. Department of Labor

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

BRB No. 15-0210 BLA

BILLY R. DINGUS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY/PITTSTON COMPANY	)	DATE ISSUED: 02/25/2016
	)	
and	)	
	)	
WELLS FARGO DISABILITY MANAGEMENT	)	
	)	
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 Granting Benefits of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Rita Roppolo (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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2012-BLA-05011) of Administrative Law Judge Stephen R. Henley, rendered on a claim filed on November 8, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with twenty-three years of underground coal mine employment, as stipulated by the parties, and found that claimant established total disability at 20 C.F.R. §718.204(b). Based on these determinations and the filing date of the claim, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] The administrative law judge further found that employer did not establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the weight accorded to the medical opinions of Drs. Fino and Castle on rebuttal. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's award of benefits.[2] The Director contends that the administrative law judge properly found that Drs. Fino and Castle expressed views that are inconsistent with the preamble to the 2001 revised regulations.

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,

[1] 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.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-three years of underground coal mine employment, a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2), and invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7, 10-11.

and in accordance with applicable law.[3] 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 rebut the presumption of total disability due to pneumoconiosis under Section 411(c)(4), employer must affirmatively establish that claimant does not have either legal[4] or clinical[5] pneumoconiosis, or that "no part of [claimant's] 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 W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *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 (April 21, 2015) (Boggs, J., concurring and dissenting).

The administrative law judge found that employer disproved the existence of clinical pneumoconiosis by a preponderance of the x-ray evidence and based on the

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[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 2; Director's Exhibit 3.

[4] 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) (emphasis added).

[5] 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, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

medical opinion evidence, as "none of the three physicians [of record] diagnosed [c]laimant with clinical pneumoconiosis."[6] Decision and Order at 17. In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge rejected the opinions of employer's physicians, Drs. Fino and Castle, that claimant suffers from bullous emphysema due solely to smoking.[7] *Id*. at 18-22. The administrative law judge specifically found that Drs. Fino and Castle expressed views that are contrary to the 2001 preamble to the revised 2001 regulations and the definition of legal pneumoconiosis. *Id*. at 20. The administrative law judge further found that neither physician gave a reasoned and documented opinion for why claimant's respiratory condition was not significantly related to, or substantially aggravated by, coal dust exposure. *Id*. at 22.

Employer contends that the administrative law judge's analysis and credibility findings are based on a misinterpretation of the preamble and that he did not properly explain the bases for his credibility determinations. We disagree. The administrative law judge noted correctly that the primary reason given by Drs. Fino and Castle for why claimant's obstructive respiratory disease was not legal pneumoconiosis was that he "suffers from bullous emphysema, which they indicated is not a form of emphysema caused by coal mine dust." Decision and Order at 19; *see* Director's Exhibit 13; Employer's Exhibits 4, 6, 7. The administrative law judge accurately identified that the Department of Labor (DOL) has recognized, in the preamble to the revised 2001 regulations, that the medical literature supports the theory that "dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms, and that coal mine dust exposure is associated with clinically significant airways obstruction." Decision and Order at 19, *citing* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000). Furthermore, the administrative law judge noted correctly that the "preamble states, without qualification or limitation as to a particular form, that coal mine dust exposure can cause emphysema." Decision and Order at 19, *citing* 65 Fed. Reg. 79,939-41.

In discussing the opinions of Drs. Fino and Castle in relation to the preamble, the administrative law judge accurately described their opinions as follows:

[6] The record includes the opinions of Drs. Forehand, Fino and Castle. Director's Exhibits 12, 13; Employer's Exhibits 4, 6, 7.

[7] The administrative law judge found that Dr. Forehand's opinion diagnosing legal pneumoconiosis was neither reasoned nor documented. Decision and Order at 18-19; Director's Exhibit 12.

> Dr. Fino testified that the preamble and the studies relied upon by the [DOL] do not include anything to indicate that any other type, other than centrilobular emphysema, is caused by coal mine dust. He also indicated that he cannot specifically explain why only smoking causes bullous emphysema, but it has something to do with the type of inflammation caused by coal [versus] smoking. "I'm not sure anybody really can, but it's just an observation that has been made over the many many years." Dr. Castle also asserted that in his experience coal mine dust does not cause any other form of emphysema besides centrilobular emphysema, unless you have higher degrees of complicated pneumoconiosis, then a person can develop bullae around the large opacities. He testified that to his knowledge the articles referenced by the preamble only reference a relationship between coal mine dust and centrilobular and focal emphysema. Dr. Fino also indicated that [c]laimant may have some degree of emphysema due to coal mine dust. Both Drs. Fino and Castle indicated that the literature used in the preamble is outdated and newer medical literature helps to differentiate between the causes of emphysema and other pulmonary conditions.

Decision and Order at 20 (internal citations omitted), *quoting* Employer's Exhibit 6 at 23; *see* Employer's Exhibit 7.

Contrary to employer's arguments, the administrative law judge permissibly determined that neither Dr. Fino nor Dr. Castle offered a reasoned and documented opinion explaining why claimant's bullous emphysema is not related to his coal mine employment:

> Drs. Fino and Castle have simply assumed that, because the medical literature does not specifically conclude that bullous emphysema is caused by coal mine dust, it could never be caused by coal mine dust. They do not offer any documentary support for their opinions that [c]laimant's emphysema is unrelated to coal dust exposure, and only make vague references to the medical literature. Both physicians state that they are unsure why bullous is unrelated to coal mine dust, simply that it is unrelated. They have not cited to actual evidence to demonstrate definitively that the bullous form of emphysema can never be caused by coal mine dust, as they agree that if a pneumoconiosis related opacity is large enough bullae could form around it.

Decision and Order at 20; *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-258 (4th Cir. 2013) (Traxler, C.J., dissenting); *Milburn Colliery Co. v.*

Hicks, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Furthermore, even assuming that bullous emphysema is not caused by coal dust exposure, the administrative law judge rationally found that Drs. Fino and Castle "fail[ed] to adequately address how twenty-three years of coal mine dust exposure could be excluded *as a contributing or aggravating factor*" in claimant's pulmonary impairment, and therefore are insufficient to disprove that claimant suffers from legal pneumoconiosis. Decision and Order at 22 (emphasis added); *see* 20 C.F.R. §718.201(b); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013) (Niemeyer, J., concurring); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Additionally, the administrative law judge noted correctly that both Drs. Fino and Castle indicated that "it is rare that pneumoconiosis will progress over time and after leaving the mines, and that it is more likely that progression of [c]laimant's impairment is due to smoking." Decision and Order at 21. Specifically, Dr. Fino testified that all of the "studies on progression after coal dust exposure were based on serial x-ray readings" and "[n]obody in the preamble looked at legal pneumoconiosis progressing or [chronic obstructive pulmonary disease] progressing." Employer's Exhibit 6 at 24-25. He stated that it is "uncommon" for clinical pneumoconiosis to progress after coal dust exposure ceases, as it only does so five to ten percent of the time, and that it is more likely that claimant's declining lung function would be due to smoking that ended in 2008, rather than coal mine dust exposure that ended in 1998. *Id*. at 24, 28. Dr. Castle also testified that coal workers' pneumoconiosis can be progressive, but that it is not common. Employer's Exhibit 7 at 23.

Based on Dr. Fino's explanation, we see no error in the administrative law judge's conclusion that Dr. Fino expressed views that are contrary to the regulations which recognize that *either* legal or clinical "pneumoconiosis is a 'latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.'" Decision and Order at 21, *quoting* 20 C.F.R. §718.201(c); *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 312-16, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998). Furthermore, in light of their views that it is uncommon for pneumoconiosis to be latent and progressive, the administrative law judge rationally concluded that Drs. Fino and Castle "did not explain why [c]laimant could not be one of the unlikely or rare cases of coal miners who contract pneumoconiosis[.]" Decision and Order at 21; *Looney*, 678 F.3d at 315-16, 25 BLR at 2-130; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *see also Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d

849 (D.C. Cir. 2002) (NMA); *Workman v. Eastern Assoc. Coal Corp.*, 23 BLR 1-22 (2004) (en banc).

As the trier-of-fact, the administrative law judge 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 Cochran*, 718 F.3d at 323, 25 BLR at 2-257-58; *Looney*, 678 F.3d at 315-16, 25 BLR at 2-130. 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 disprove the presumed fact of legal pneumoconiosis, based on the opinions of Drs. Fino and Castle, and that employer failed to establish rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).[8] *See Bender*, 782 F.3d at 137; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

With regard to the presumed fact of disability causation, the administrative law judge rationally determined that the opinions of Drs. Fino and Castle 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 Hobet Mining, LLC v. Epling*, 783 F.3d 498 (4th Cir. 2015); *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 24-25. 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 under 20 C.F.R. §718.305(d)(1)(ii). *See Bender*, 782 F.3d at 137.

[8] Because the administrative law judge provided valid reasons for rejecting the opinions of Drs. Fino and Castle relevant to the etiology of claimant's bullous emphysema, it is not necessary that we address employer's contention that the administrative law judge mischaracterized the record in stating that the "radiographic evidence does not specify the form of emphysema[.]" Decision and Order at 19; *see Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Additionally, because employer must disprove the existence of both legal and clinical pneumoconiosis, the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis precludes rebuttal of the presumption under 20 C.F.R. §718.305(d)(1)(i). *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015).

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge