U.S. Department of Labor

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

BRB No. 15-0272 BLA

JACKIE W. ANGLES[1]	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 02/29/2016
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin, and M. Rachel Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

HALL, Chief Administrative Appeals Judge:

[1] In a motion dated July 31, 2015 employer informed the Board that claimant died on June 7, 2015, and requested the Board to determine whether a valid legal representative exists to pursue this claim. By Order dated October 6, 2015, the Board denied employer's motion on the ground that a miner's claim does not abate upon his death. 20 C.F.R. §725.545(c).

Employer appeals the Decision and Order (2011-BLA-5909) of Administrative Law Judge John P. Sellers, III (the administrative law judge), 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 subsequent claim filed on April 10, 2010.[2]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[3] the administrative law judge credited claimant with eighteen years of qualifying coal mine employment,[4] and found that the evidence established that claimant had 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 rebuttable presumption set forth at Section 411(c)(4). Consequently, the administrative law judge also found that claimant established that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309(c). Finally, the administrative law judge determined that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge applied an incorrect standard in considering whether employer established rebuttal of the Section 411(c)(4) presumption. Employer further asserts that the administrative law judge erred by failing to consider all the x-ray and computed tomography (CT) scan evidence relevant to the existence of pneumoconiosis, as required by the Administrative Procedure

[2] Claimant filed his prior claim on November 25, 2002. In a Decision and Order dated October 2, 2006, Administrative Law Judge Richard T. Stansell-Gamm denied claimant's prior claim because the evidence did not establish the existence of pneumoconiosis. On November 13, 2008, the district director denied claimant's request for modification. Decision and Order at 2.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment and a totally disabling respiratory impairment is established. 30 U.S.C. §921(c)(4) (2102); *see* 20 C.F.R. §718.305.

[4] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

Act.[5] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[6]

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 of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant did not have either legal or clinical pneumoconiosis,[7] 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 [20 C.F.R.] §718.201." 20

[5] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), requires that the administrative law judge consider all relevant evidence, render findings on all material issues of fact or law, and set forth the rationale underlying his findings. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Employer's Brief at 9-12.

[6] Employer does not challenge the finding by Administrative Law Judge John P. Sellers, III (the administrative law judge), that claimant established eighteen years of qualifying coal mine employment, or his findings that claimant established invocation of the presumption of total disability due to pneumoconiosis at Section 411(c)(4) and, therefore, established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. We, therefore, affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[7] "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 respiratory or pulmonary disease or 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).

C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

In evaluating whether employer established that claimant did not have legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Fino, Hippensteel, and Castle.[8] Drs. Fino and Hippensteel opined that claimant did not suffer from legal pneumoconiosis, but suffered from a restrictive pulmonary impairment secondary to idiopathic pulmonary fibrosis, that is unrelated to coal mine dust exposure. Employer's Exhibits 1, 2, 10, 11. Dr. Castle opined that claimant did not suffer from any form of pneumoconiosis and did not have a respiratory impairment from any cause. Employer's Exhibit 5. The administrative law judge discredited the opinions of Drs. Fino, Hippensteel, and Castle because he found their opinions to be poorly reasoned and unpersuasive. Decision and Order at 33. The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis.

Employer asserts that the administrative law judge did not properly address whether the opinions of Drs. Fino and Hippensteel are sufficient to disprove the existence of legal pneumoconiosis, as defined at 20 C.F.R. §718.201.[9] Employer's Brief at 6-9. Employer asserts that the administrative law judge erred in requiring employer to "rule out" any contribution by coal mine dust exposure to claimant's respiratory impairment "when employer is only required to demonstrate" that claimant did not suffer from a "chronic dust disease of the lungs *significantly related* to or *substantially aggravated* by coal mine dust." Employer's Brief at 6-9. Thus, employer asserts, the administrative law judge erred in discrediting of the opinions of Drs. Fino and Hippensteel because they did not "rule out" the existence of pneumoconiosis by opining that "no part" of any chronic dust disease of the lung was due to coal mine dust exposure. Employer's Brief at 9. We disagree.

The administrative law judge correctly stated that in order to rebut the presumption employer must "establish that claimant did not have pneumoconiosis."

[8] The administrative law judge also considered the opinions of Drs. Forehand, Al-Khasawneh, Patel, Splan, Gallai, and Rasmussen. The administrative law judge correctly noted that, as these physicians each attributed claimant's impairment to coal mine dust exposure, their opinions do not assist employer in carrying its burden to rebut the presumption that claimant's impairment was legal pneumoconiosis. *See* 20 C.F.R. §§718.305(d)(1)(i)(A), 718.201(b); Decision and Order at 10-11, 19-22, 35-37; Director's Exhibits 1, 12; Employer's Exhibits 12, 13; Claimant's Exhibits 3, 4.

[9] As employer raises no challenge to the administrative law judge's determination to discredit Dr. Castle's opinion, it is affirmed. *See Skrack*, 6 BLR at 1-711.

Decision and Order at 24; *see* 20 C.F.R. §718.305(d)(2)(i). Contrary to employer's assertion, the administrative law judge did not find the opinions of Drs. Fino and Hippensteel to be insufficient to disprove the existence of legal pneumoconiosis on the ground that they failed to rule out coal mine dust exposure as a causative factor for claimant's respiratory impairment. Decision and Order at 24-34. Rather, he found that their opinions on the existence of legal pneumoconiosis were not credible, taking into consideration the rationales provided by each physician for why claimant did not have legal pneumoconiosis. *Id*. Specifically, the administrative law judge considered Dr. Fino's testimony that, in order to attribute claimant's restrictive lung disease to coal mine dust exposure, he would need to see "definite pulmonary nodularity in the classic findings of pneumoconiosis on the x-ray and CT scan, which [claimant] does not have."[10] Decision and Order at 30; Employer's Exhibit 11 at 21. Decision and Order at 30; Employer's Exhibits 2 at 10, 12-13; 11 at 12. Correctly noting that a diagnosis of legal pneumoconiosis is not dependent upon x-ray readings, Decision and Order at 25, *referencing Cornett v. Benham Coal Inc.*, 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-22 (6th Cir. 2000), the administrative law judge permissibly discredited Dr. Fino's opinion, in part, because he relied on the absence of x-ray evidence of clinical pneumoconiosis to conclude that claimant's restrictive impairment was not a form of legal pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4), (b); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313, 25 BLR 2-115, 2-127 (4th Cir. 2012); Decision and Order at 30-31.

The administrative law judge also discredited Dr. Fino's opinion that the decline in claimant's pulmonary function was too rapid to be consistent with an impairment caused by coal mine dust exposure, but was consistent with the effects of an active inflammatory process such as idiopathic pulmonary fibrosis. Decision and Order at 31; Employer's Exhibit 11 at 14, 24. The administrative law judge permissibly found Dr. Fino's reasoning to be insufficient, because the regulations do not require the imposition of a time period in determining whether a claimant's pneumoconiosis is progressive, *see* 20 C.F.R. §718.201, and because Dr. Fino did not cite to any studies or articles to support his conclusion that claimant's impairment progressed too quickly to be caused by coal mine dust exposure. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); Decision and Order at 31. As it is supported by substantial evidence, we affirm the administrative law judge's determination to discredit Dr. Fino's opinion that

[10] As noted by the administrative law judge, Dr. Fino acknowledged that claimant's x-rays and computed tomography (CT) scans were very abnormal, but opined that the shape and location of the opacities reflected therein, characterized as "bilateral lower lobe interstitial changes consistent with honeycombing," is consistent with idiopathic pulmonary fibrosis and is not consistent with opacities of coal workers' pneumoconiosis. Employer's Exhibits 2 at 10, 12-13; 11 at 12.

claimant did not have legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(A); *see Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000). Further, as the administrative law judge did not reject Dr. Fino's opinion for failing to "rule out" all contribution of coal mine dust exposure to claimant's respiratory impairment, but based his credibility finding on Dr. Fino's failure to provide sufficient reasoning for his conclusions, any error in the administrative law judge's recitation of an erroneous legal standard is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).

The administrative law judge also permissibly discredited Dr. Hippensteel's opinion because, like Dr. Fino, Dr. Hippensteel relied, in part, on the absence of x-ray evidence of clinical pneumoconiosis to conclude that claimant's restrictive pulmonary impairment was unrelated to coal mine dust exposure.[11] *See* 20 C.F.R. §718.202(a)(4), (b); *Looney*, 678 F.3d at 313, 25 BLR at 2-127; Decision and Order at 30-31. The administrative law judge also correctly observed that, in concluding that claimant did not suffer from legal pneumoconiosis, Dr. Hippensteel relied, in part, on the fact that claimant's impairment is purely restrictive in nature. Decision and Order at 34; Employer's Exhibit 10 at 24-25. Specifically, Dr. Hippensteel explained that it is "more usual" for coal mine dust to cause a "combination of restrictive and obstructive disease," while interstitial fibrosis "commonly" causes a purely restrictive disease. Decision and Order at 34; Employer's Exhibit 10 at 34. The administrative law judge permissibly discounted Dr. Hippensteel's opinion "as based on generalities of a typical impairment pattern rather than on the specifics of the individual miner's case, which could also prove to be atypical." *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); Decision and Order at 34. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that Dr. Hippensteel's opinion does not establish that claimant did not have legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(A); *see Compton*, 211 F.3d at 207-208, 22 BLR at 2-168. Further, because the administrative law judge did not discredit Dr. Hippensteel's opinion on the ground that he failed to "rule out" all contribution of coal mine dust exposure to claimant's respiratory impairment, but because he failed to provide adequate reasoning in support of his conclusions, any error in the administrative law judge's recitation of an erroneous legal standard is harmless. *See Larioni*, 6 BLR at 1-1278.

[11] Dr. Hippensteel testified that his conclusion that claimant's impairment was not related to coal mine dust exposure is based, in part, on "the fact that this abnormality on [claimant's] chest x-ray is not suggestive of coal workers' pneumoconiosis" because "he has no evidence of any abnormalities . . . in the upper lobes." Employer's Exhibit 10 at 27-28.

As the administrative law judge rationally discredited the opinions of Drs. Fino, Hippensteel, and Castle, the only opinions supportive of a finding that claimant did not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant did not have pneumoconiosis.[12] *See* 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant did not have pneumoconiosis.

The administrative law judge next addressed whether employer could establish rebuttal by showing that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge rationally found that the same reasons he provided for discrediting the opinions of Drs. Fino, Hippensteel, and Castle, that claimant did not suffer from legal pneumoconiosis, also undercut their opinions that claimant's disabling respiratory impairment was not caused by pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, BLR (4th Cir. 2015); Decision and Order at 37. Thus, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of claimant's total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Claimant invoked the Section 411(c)(4) presumption that he was totally disabled due to pneumoconiosis, and employer did not rebut the presumption. Therefore, we affirm the award of benefits. 30 U.S.C. §921(c)(4).

[12] We, therefore, need not address employer's allegations of error with respect to the administrative law judge's consideration of the x-ray and CT scan evidence, as these arguments pertain to whether employer disproved the existence of clinical pneumoconiosis. *See West Virginia CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA (Apr. 21, 2015); *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66; Employer's Brief at 9-12.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring in the result:

I agree with my colleagues that the administrative law judge discredited the opinions of Drs. Fino and Hippensteel for the reasons cited with respect to rebuttal of the existence of legal pneumoconiosis. Employer has not raised any objections to these rationales adopted by the administrative law judge for discrediting the physicians' opinions. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Consequently the opinions of Drs. Fino and Hippensteel could not sustain employer's burden of rebuttal regardless of what rebuttal standard was employed. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 556, 25 BLR 2-339, 2-349-50 (4th Cir. 2013). Under these circumstances, it is unnecessary to go further to analyze the administrative law judge's credibility determinations. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985). I therefore concur in the result.

JUDITH S. BOGGS
Administrative Appeals Judge