U.S. Department of Labor

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

BRB No. 16-0207 BLA

JOHN B. JENNELLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 02/13/2017
	)	
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 Awarding Benefits in a Subsequent Claim of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

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

Rebecca J. Fiebig (Maia Fisher, Associate Solicitor of Labor; 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 GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits in a Subsequent Claim (2010-BLA-05814) of Administrative Law Judge Morris D. Davis, rendered 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 initially found that claimant's November 3, 2009 subsequent claim[1] was timely filed pursuant to 20 C.F.R. §725.308. The administrative law judge next credited claimant with fifteen and one-half years of underground coal mine employment, and found that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Based on these determinations and the filing date of the claim, the administrative law judge found that claimant invoked the rebuttable presumption set forth at Section 411(c)(4), 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305,[2] and that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge further found that employer failed to rebut the Section 411(c)(4) presumption and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in failing to find that the claim is time-barred or that employer established rebuttal of the Section 411(c)(4) presumption. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to affirm the administrative law judge's finding that the claim was timely filed. Claimant has not filed a response brief.[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,

[1] Claimant filed an initial claim on March 18, 1997, which was denied by the district director on June 2, 1997, because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant took no action with regard to the denial until he filed his current subsequent claim on November 3, 2009. Director's Exhibit 3.

[2] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption of total disability 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), as implemented by 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established fifteen and one-half years of underground coal mine employment, total disability pursuant to 20 C.F.R. §718.204(b), a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and invocation of 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, 18-19.

and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

Timeliness of the Claim

Section 422 of the Act provides that "[a]ny claim for benefits by a miner . . . shall be filed within three years after . . . a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). In addition, the implementing regulation requires that the medical determination have "been communicated to the miner or a person responsible for the care of the miner," and further provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(a), (c). Therefore, in order to rebut the presumption of timeliness, employer must show by a preponderance of the evidence that the claim was filed more than three years after a "medical determination of total disability due to pneumoconiosis" was communicated to the miner or his agent. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held in *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 426-27, 23 BLR 2-321, 2-329-30 (4th Cir. 2006), that an oral communication of a medical determination of total disability due to pneumoconiosis is sufficient to trigger the running of the statute of limitations. *See also Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 595-96, 25 BLR 2-273, 2-283 (6th Cir. 2013).

The legislative history of the Act does not explain why a statute of limitations was included. *Adkins v. Donaldson Mine Co.*, 19 BLR 1-34, 1-38 (1993). However, "[s]tatutes of limitation generally proceed on the theory that a man forfeits his rights only when he inexcusably delays assertion of them." *Ingalls Shipbuilding Div., Litton Systems, Inc. v. Hollinhead*, 571 F.2d 272, 274-275, 8 BRBS 159, 161 (5th Cir. 1978). Consistent with the premise that the Act is remedial legislation that is to be liberally construed, the Board has held that the "statute of limitations must be construed in a manner that does not unduly restrict the filing and pursuit of claims." *Adkins*, 19 BLR at 1-39; *see generally Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 13 BLR 2-38 (6th Cir. 1989); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984).

[4] 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 and West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

Employer argues that testimony elicited from claimant on cross-examination at the hearing establishes that claimant knew he was totally disabled due to pneumoconiosis sometime in 2000, more than three years prior to the filing of his November 3, 2009 subsequent claim. During the hearing held by the administrative law judge on June 24, 2015, claimant was represented by a lay representative. On cross-examination, claimant was questioned by employer's counsel as follows:

> Q. Who was the first doctor after that 1997 claim to tell you that you had black lung?
>
> A. Dr. Soul.
>
> Q. All right. Do you happen to know how you spell his name or her name?
>
> A. Its S-O-U-L, Dr. Soul, he done the open heart surgery and told me I had lung disease.
>
> Q. Did he tell you that you had black lung?
>
> A. Yes, Sir.
>
> Q. Now when did he tell you that? Do you remember the year approximately?
>
> A. What year did I have open heart surgery? Oh gosh.
>
> Q. She [unidentified] can't answer for you because she's not under oath.
>
> A. I understand, but if I'm not mistaken it's 2000. I could be very, very wrong.
>
> Q. Did that doctor tell you that you were disabled because of your black lung?
>
> A. He told me that my lungs were so bad that I'd never be able to do nothing, but he didn't want to ---
>
> Q. Did he tell you that was because of your black lung?
>
> A. He said it was because of my coal dust and stuff, rock dust.
>
> Q. And you understood that to mean that because of that coal mine dust and lung disease, you could not go back and work in the mines?

A. Oh, yes, yes.

Hearing Transcript at 27-28.[5]

In his Decision and Order, the administrative law judge rejected employer's argument that claimant's subsequent claim is time-barred, and concluded:

> I do not find that Dr. Soul's statement, as recollected by [c]laimant, constitutes a diagnosis of a totally disabling respiratory impairment due to coal dust exposure. Even if it could be construed as such, I do not accord weight to the opinion of a physician whose credentials are unknown and whose medical specialty apparently is cardiac surgery. Employer has not rebutted the presumption of timeliness with credible evidence that a medical determination of total disability due to pneumoconiosis had been communicated to [c]laimant more than three years before he filed his claim.

Decision and Order at 5.

Employer argues that the administrative law judge failed to explain the basis for his ruling as required by the Administrative Procedure Act (APA).[6] The Director, however, urges the Board to affirm the administrative law judge's finding that the claim was timely filed. The Director asserts that "it is not clear from [claimant's] testimony whether Dr. Soul concluded that [claimant] was physically *incapable* of working as a miner or whether he should avoid further exposure to coal mine dust so as not to worsen his existing condition. The former constitutes a diagnosis of totally disabling pneumoconiosis while the latter does not." Director's Brief at 2; *see Zimmerman v. Director, OWCP*, 871 F. 2d 564, 567, 12 BLR 2-254 (6th Cir. 1989) (a recommendation against further coal dust exposure does not establish a total respiratory disability).

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[5] The record indicates that a "Dr. Sewell" performed a coronary artery bypass graft on May 3, 2001, and treatment notes on May 2, 2001, include a notation of "moderate [chronic obstructive pulmonary disease] COPD" and a "[h]istory of coal workers' pneumoconiosis." Employer's Exhibit 5 at 10, 23. Employer also refers to Dr. Sewell as claimant's heart surgeon in its brief. It is unclear from the record whether claimant forgot or misspelled the physician's name at the hearing or whether there is both a "Dr. Sewell" and a "Dr. Soul" who treated claimant.

[6] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a), requires that every adjudicatory decision include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A).

Although the administrative law judge could have more fully explained the basis for his finding that employer did not rebut the presumption of timeliness, remand is not required. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316, 25 BLR 2-115, 2-133 (4th Cir. 2012) (if a reviewing court can discern what the administrative law judge did and why he or she did it, the duty of explanation under the APA is satisfied). We conclude that the administrative law judge acted within his discretion in declining to adopt the inferences employer draws from claimant's testimony. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). We agree with the Director that "given the lack of specificity regarding Dr. Soul's conclusions," claimant's testimony regarding what he was told by Dr. Soul does not establish that claimant received a medical determination of total disability due to pneumoconiosis sometime in 2000. Director's Brief at 2; *see Zimmerman*, 871 F.2d at 567, 12 BLR at 2-258. Therefore, we see no error in the administrative law judge's rational finding that "Dr. Soul's statement, as recollected by [c]laimant" was not sufficient to satisfy employer's burden to rebut the presumption that the claim was timely filed. Decision and Order at 5.

The question of whether the evidence is sufficient to rebut the presumption of timeliness involves factual findings that are to be made by the administrative law judge. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-51 (1989) (en banc). Moreover, the weight to accord hearing testimony is within the sound discretion of the administrative law judge. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-589, 2-606 (4th Cir. 1999). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to satisfy its burden to rebut the presumption that claimant timely filed his claim pursuant to 20 C.F.R. §725.308(c).[7] *See Adkins*, 19 BLR at 1-39; *Clark*, 12 BLR at 1-52.

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

[7] Because we affirm the administrative law judge's determination that claimant's testimony is insufficient to satisfy employer's burden to rebut the presumption of timeliness, it is not necessary that we address employer's challenge to the administrative law judge's alternate finding that he would "not accord weight to the opinion of a physician whose credentials are unknown and whose medical specialty apparently is cardiac surgery." Decision and Order at 5; *see Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

In order to rebut the Section 411(c)(4) presumption of total disability due to pneumoconiosis, employer must affirmatively establish that claimant has neither legal[8] nor clinical[9] 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); *see West Virginia CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (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.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting).

The administrative law judge found that employer disproved the existence of clinical pneumoconiosis but failed to establish that claimant does not have legal pneumoconiosis. Decision and Order at 21-27. Thus, the administrative law judge determined that employer did not establish rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i). *Id.* at 27. Employer argues that the administrative law judge applied the wrong standard in considering whether it disproved the existence of legal pneumoconiosis and erred in discrediting the opinions of Drs. Castle and Tuteur. Employer's arguments are rejected as without merit.

The administrative law judge noted correctly that Dr. Castle opined that claimant is totally disabled by bronchial asthma and chronic bronchitis due entirely to smoking.

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[8] 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).

[9] 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).

Decision and Order at 24; Employer's Exhibits 1, 10, 19. The administrative law judge also noted correctly that one of the rationales given by Dr. Castle for completely excluding coal dust exposure as a causative factor for claimant's chronic obstructive pulmonary disease [COPD] was that claimant's respiratory or pulmonary impairment was consistent with smoking and "claimant's marked reduction in the FEV1/FVC ratio is not characteristic of obstruction related to coal mine dust exposure." Decision and Order at 25; *see* Employer's Exhibit 19 at 29. Contrary to employer's argument, the administrative law judge permissibly found that Dr. Castle's opinion conflicts with the scientific evidence endorsed by the Department of Labor in the preamble to the 2001 revised regulations indicating that, "coal miners have an increased risk of COPD [and that] COPD may be detected from decrements in certain measures of lung function, especially FEV1 *and the ratio of FEV1/FVC*." 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000) (emphasis added); *see Looney*, 678 F.3d at 314, 25 BLR at 2-130; *see also Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F. 3d 248, 24 BLR 2-369 (3rd Cir. 2011); Decision and Order at 25-26. Thus, we affirm the administrative law judge's finding that Dr. Castle's opinion was not sufficiently reasoned to establish that claimant does not have legal pneumoconiosis.[10] *Milburn Colliery Co. v. Hicks* 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Decision and Order at 26.

We also reject employer's argument that the administrative law judge erred in his treatment of Dr. Tuteur's opinion. The administrative law judge properly noted that Dr. Tuteur agrees that COPD due to smoking and COPD due to coal dust exposure can have a similar clinical presentation but that Dr. Tuteur "relies on medical literature, experience and statistical likelihood to eliminate coal mine dust exposure entirely as a cause in [c]laimant's COPD." Decision and Order at 26; *see* Employer's Exhibits 4, 9, 11. The administrative law judge noted that Dr. Tuteur relied, in part, on medical studies showing that the frequency of coal mine dust-related COPD is very low when compared with rates of COPD in cigarettes smokers who are not coal miners. Decision and Order at 26; Employer's Exhibit 4. The administrative law judge permissibly found, however, that, "[e]ven if Dr. Tuteur could rely on probability as a viable means to determine that [c]laimant's cigarette smoking history is the only etiology of [c]laimant's COPD, Dr. Tuteur's opinion remains insufficient in terms of rebutting the presence of legal pneumoconiosis because he did not explain how he determined that [c]laimant was not in

[10] Because the administrative law judge gave a rational basis for rejecting Dr. Castle's opinion that claimant does not have legal pneumoconiosis, it is not necessary that we address employer's remaining arguments regarding the administrative law judge's treatment of Dr. Castle's opinion. *See Kozele*, 6 BLR at 1-382 n.4.

the minority of coal miners who actually developed COPD due in part to his coal mine dust exposure." Decision and Order at 27; *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008) (general reference to medical literature, and not the miner's specific condition, is not probative). Thus, because the administrative law judge rationally determined that Dr. Tuteur's opinion is based on generalities, we affirm the administrative law judge's finding that Dr. Tuteur's opinion is not credible to disprove that claimant has legal pneumoconiosis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 27.

Additionally, we reject employer's argument that the administrative law judge misstated the legal standard for disproving the existence of legal pneumoconiosis, to the extent that the administrative law judge concluded that Drs. Castle and Tuteur "fail[ed] to explain how 15.5 years of coal mine dust exposure could be excluded as a contributing or aggravating factor in [c]laimant's COPD." Decision and Order at 27. The administrative law judge properly considered whether employer disproved legal pneumoconiosis taking into consideration the regulatory definition and the correct legal standard. The administrative law judge specifically noted that Dr. Castle provided *no explanation* for why claimant's impairment was not significantly related to, or substantially aggravated by, dust exposure in coal mine employment. Decision and Order at 26, *citing* 20 C.F.R. § 718.201(b). In finding that Dr. Tuteur "has not sufficiently explained his rationale for concluding that cigarette smoking is the exclusive cause of [c]laimant's respiratory condition," the administrative law judge properly noted that coal mine dust need only "substantially aggravate or significantly relate to an impairment or condition for the condition to constitute legal pneumoconiosis; it does not need to be the most significant cause or factor." Decision and Order at 27.

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 to assign those opinions appropriate weight. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013) (Traxler, C.J., dissenting); *Looney*, 678 F.3d at 314-15, 25 BLR at 2-129-30; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the opinions of Drs. Castle and Tuteur are not sufficiently reasoned 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), by proving that claimant does not have pneumoconiosis. *See Bender*, 782 F.3d at 137; 25 BLR at 2-699; s*ee Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Relying on his credibility findings regarding employer's physicians at 20 C.F.R. §718.305(d)(1)(i)(A), the administrative law judge concluded that employer did not rebut

the presumed fact that the miner's total respiratory or pulmonary disability was caused by pneumoconiosis under 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 28. Specifically, the administrative law judge concluded that "Dr. Castle's and Dr. Tuteur's opinions on the cause of [c]laimant's total disability are not persuasive because they did not diagnose [c]laimant as having pneumoconiosis, a fact that is presumed and unrebutted by the evidence." *Id.*; *see Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

Employer does not raise any arguments with regard to the administrative law judge's findings on disability causation, other than to assert that claimant does not have legal pneumoconiosis. As it is supported by substantial evidence, we affirm the administrative law judge's determination that employer failed to establish rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii), by establishing that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. *See Bender*, 782 F.3d at 137, 25 BLR at 2-699.

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

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge