U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0225 BLA

JERRY D. DICKERSON Claimant-Respondent v. CONSOLIDATION COAL COMPANY c/o HEALTHSMART CASUALTY CLAIMS and Self-insured through CONSOL ENERGY, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/13/2018 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

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

Matthew J. Moynihan (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-BLA-05392) of Administrative Law Judge Larry W. Price rendered 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 miner's claim filed on April 3, 2013.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[1] the administrative law judge credited claimant with twenty-four years of underground coal mine employment and found that the evidence established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge thus determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). The administrative law judge further 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 determining that claimant had a forty year smoking history, arguing that it was significantly greater, which could impact his weighing of the medical evidence. Employer further argues that the administrative law judge erred in finding that employer did not rebut the presumption. In response, claimant urges affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, did not file a substantive response in this case.[2]

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] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established twenty-four years of qualifying coal mine employment, the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b), and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 8-9.

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).

Smoking History

Employer argues that the administrative law judge erred in finding that claimant has a smoking history of at least one pack per day for over forty years. Employer's Brief at 5-7. Employer contends that the administrative law judge should have found that "the proper duration of claimant's smoking history is 46 years" and that claimant smoked 1.5 packs per day. Employer's Brief at 5-6. Employer also argues that the administrative law judge failed to adequately explain his finding. We disagree.

The length and extent of the miner's smoking history is a factual determination for the administrative law judge. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). The administrative law judge noted that claimant did not testify at the hearing about his smoking history and that the record contains a widely varied history of smoking in the medical opinions and treatment records, ranging from twenty years to forty-five years, and from a quarter pack per day to two packs per day. Decision and Order at 6-7. Thus the administrative law judge stated that it was difficult to determine claimant's smoking history to an exact figure. *Id.* Taking into consideration the totality of the varied accounts of claimant's smoking history, the administrative law judge explained that "[b]ased upon the most often reported figures, I find that [c]laimant has a smoking history of at least one pack per day for over 40 years with [c]laimant continuing to smoke at least until 2014." Decision and Order at 7. As discussed further below, employer has not shown how a specific finding of forty-six years, rather than the administrative law judge's finding of "at least one pack per day for over 40 years," would have made a difference in this case. Because the record reflects that the administrative law judge considered the complete range of claimant's reported smoking histories, and explained his resolution of the conflicting evidence, we affirm the administrative law judge's permissible determination that the weight of the evidence supports a smoking history of at least one pack per day for over forty years. *See Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *see Mabe v.*

[3] The record reflects that claimant's last coal mine employment was in Virginia. Hearing Transcript at 21. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

Bishop Coal Co., 9 BLR 1-67, 1-68 (1986); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

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 has neither legal nor clinical pneumoconiosis,[4] 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 C.F.R. §718.305(d)(1)(i), (ii).

The administrative law judge found that employer disproved the existence of clinical pneumoconiosis, but did not disprove the existence of legal pneumoconiosis. The administrative law judge considered the opinions of Drs. Sargent and Fino, that claimant does not have legal pneumoconiosis but suffers from a total respiratory disability related solely to smoking. Decision and Order at 9-17; Director's Exhibit 14; Employer's Exhibits 1, 15, 16. The administrative law judge discredited the opinions of Drs. Sargent and Fino as unpersuasive and inadequately explained. Decision and Order at 11-13, 15-17. Consequently, the administrative law judge found that employer did not disprove the existence of legal pneumoconiosis and, therefore, failed to rebut the presumed fact of pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i). *Id*. at 17.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Sargent and Fino. Employer asserts that the administrative law judge's error in calculating claimant's smoking history caused the administrative law judge to further err in discrediting the opinions of Drs. Sargent and Fino based on their "attribution of all of claimant's disability to his smoking history." Employer's Brief at 7. We disagree.

[4] Clinical pneumoconiosis is defined as "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. 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). "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).

Initially, we note that we have affirmed the administrative law judge's finding that claimant smoked at least one pack per day for over forty years. *See supra* at 4. Moreover, contrary to employer's assertion, the administrative law judge did not discredit the opinions of Drs. Sargent and Fino based on their reliance on an inaccurate smoking history. The administrative law judge considered the smoking histories relied on by both doctors and found that while the physicians may have relied on a lesser smoking history than he found established, they were aware of the greater smoking histories in the record. Thus, the administrative law judge found that the doctors' reliance on a lesser smoking history did not detract from the credibility of their opinions. Decision and Order at 11-12, 15.

Moreover, the administrative law judge did not discount their opinions because he found a shorter smoking history than that suggested by employer.[5] Rather, in light of the scientific studies found credible by the Department of Labor, as set forth in the preamble, that the effects of smoking and coal mine dust are additive, the administrative law judge found that neither Dr. Sargent nor Dr. Fino adequately explained his opinion. Decision and Order at 13, 15-16, *citing* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000). Specifically, he permissibly found that neither physician explained how he eliminated claimant's twenty-four years of coal mine dust exposure as a contributing or exacerbating factor, along with cigarette smoking, to his disabling respiratory impairment. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *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); Decision and Order at 11-13, 15-17. Substantial evidence supports the administrative law judge's credibility determinations regarding the opinions of Drs. Sargent and Fino, as neither physician discussed coal dust exposure as a contributing or exacerbating factor. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000). As employer raises no further challenge to the administrative law judge's finding that employer failed to disprove that claimant has legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i), it is affirmed.

The administrative law judge next addressed whether employer established rebuttal by proving 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 C.F.R. §718.305(d)(1)(ii). The administrative law judge permissibly found that the same reasons for which he discredited the opinions of Drs. Sargent and Fino that claimant does not suffer from legal pneumoconiosis also undercut the physicians' opinions that

[5] We note further that the administrative law judge's finding of "over forty years" would encompass forty-six years.

claimant's disabling impairment is unrelated to his coal mine employment. 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-741 (6th Cir. 2015); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473-73 (6th Cir. 2013); Decision and Order at 21. Moreover, employer has not raised any specific challenge to this finding. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Therefore, we affirm the administrative law judge's determination that employer failed to prove that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, claimant has established his entitlement to benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge