U.S. Department of Labor

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

BRB No. 17-0243 BLA

ROBERT E. ROBERTS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOLLOY MINING, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 02/13/2018
	)	
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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

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

Andrea L. Berg and Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2014-BLA-05663) of Administrative Law Judge Richard A. Morgan awarding benefits on a claim filed pursuant to 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 17, 2013.[1]

After crediting claimant with at least twenty-three years of qualifying coal mine employment,[2] the administrative law judge found that claimant suffers from 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 Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis,[3] 30 U.S.C. §921(c)(4) (2012), and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

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[1] Claimant's initial claim, filed on November 8, 2005, was finally denied by the district director on October 26, 2006, because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 1.

[2] Claimant's coal mine employment was in West Virginia. Director's Exhibit 5. 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, 1-202 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more 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 impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption, and that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[5] 20 C.F.R. §718.305(d)(1)(i), or 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 found that employer failed to establish rebuttal by either method.[6]

To establish that claimant does not suffer from legal pneumoconiosis, employer must demonstrate that claimant does not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). In evaluating whether employer met its burden, the administrative law judge considered the opinions of Drs. Zaldivar and Basheda, both of whom opined that claimant does not have legal pneumoconiosis.[7] Dr. Zaldivar opined that claimant suffers

[5] "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is 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).

[6] The administrative law judge, however, found that employer established that claimant does not have clinical pneumoconiosis. Decision and Order at 41.

[7] The administrative law judge also considered the opinions of Drs. Porterfield, Habre, and Everhart. Decision and Order at 38-39. Dr. Porterfield diagnosed legal pneumoconiosis, in the form of emphysema due to both smoking and coal mine dust exposure. Drs. Habre and Everhart also diagnosed legal pneumoconiosis, in the form of an obstructive impairment due to both smoking and coal mine dust exposure. Claimant's Exhibits 4, 5.

from an obstructive pulmonary impairment due to asthma and cigarette smoking, and that neither of these conditions is due to claimant's coal mine dust exposure. Director's Exhibit 27; Employer's Exhibit 11 at 23-24, 28. Dr. Basheda opined that claimant is suffering from "tobacco-induced obstructive lung disease with an associated asthmatic component," unrelated to coal mine dust exposure. Employer's Exhibits 3; 10 at 32-33.

The administrative law judge discounted their opinions because he found that they failed to adequately explain how they eliminated claimant's twenty-three years of coal mine dust exposure as a contributor to his disabling obstructive pulmonary impairment. Decision and Order at 40. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis. *Id.*

Employer initially argues that the administrative law judge applied an improper rebuttal standard by requiring Drs. Zaldivar and Basheda to "rule out" the existence of legal pneumoconiosis. Employer's Brief at 5, 7-8, 13. We disagree. A review of the Decision and Order reflects that the administrative law judge correctly stated that employer bore the burden of establishing by a preponderance of the evidence that claimant does not have legal pneumoconiosis, i.e., a lung disease significantly related to, or substantially aggravated by, dust exposure in coal mine employment. Decision and Order at 32; *see* 20 C.F.R. §§718.201(b), 718.305(d)(1)(i). Moreover, as discussed, *infra*, the administrative law judge did not reject the opinions of Drs. Zaldivar and Basheda because they were insufficient to meet a "rule out" standard on the existence of legal pneumoconiosis. Rather, he found their opinions not credible because they were not adequately explained. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14, 25 BLR 2-115, 2-128 (4th Cir. 2012) (holding that an administrative law judge may accord less weight to a physician who fails to adequately explain why a miner's obstructive disease "was not due at least in part to his coal dust exposure").

Employer next contends that the administrative law judge failed to provide valid reasons for discrediting the opinions of Drs. Zaldivar and Basheda. We disagree. Dr. Zaldivar explained that the genesis of the damage caused by coal mine dust exposure and cigarette smoking has not been proven to be the same,[8] but acknowledged that "[a]t some point along the progressive destruction of the lungs, eventually there is a *common pathway* which is shared by coal dust inhalation and smoking." Director's Exhibit 27 at 4 (emphasis added). Given Dr. Zaldivar's acceptance that, at some point, smoking and coal mine dust share a common pathway in the destruction of the lung, the administrative law judge legitimately questioned how Dr. Zaldivar was able to eliminate claimant's coal

[8] Dr. Zaldivar noted that medical articles indicate that cigarette smoking causes emphysema by causing "DNA damage" and a defect in immunoglobulin production. He further noted that there "are no articles similar to these in the black lung literature." Director's Exhibit 27 at 4.

mine dust exposure as a contributing factor to his emphysema. *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000) (setting forth the Department of Labor's acceptance of the view that smoking and coal mine dust exposure have additive effects on pulmonary and respiratory function); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532 n.9, 21 BLR 2-323, 2-335 n.9 (4th Cir. 1998); Decision and Order at 40; *see also* 20 C.F.R. §718.201(a)(2), (b).

The administrative law judge also questioned the reasoning underlying Dr. Basheda's opinion. Dr. Basheda opined that claimant's degree of FEV1 reduction was found in smokers and underground miners. Employer's Exhibit 3 at 31. Because claimant worked aboveground, Dr. Basheda opined that claimant's loss in FEV1 was caused by smoking, not coal mine dust exposure. *Id.* The administrative law judge permissibly questioned this reasoning, in view of his finding that claimant's aboveground coal mine employment took place in conditions substantially similar to those of an underground mine. *Hicks*, 138 F.3d at 532 n.9, 21 BLR at 2-335 n.9; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 28, 40.

The administrative law judge also found that Drs. Zaldivar and Basheda did not adequately explain why claimant's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of, or contributor to, his remaining disabling obstructive impairment,[9] and the administrative law judge permissibly accorded less weight to their opinions on that basis. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Clark*, 12 BLR at 1-155 (1989) (en banc); Decision and Order at 40.

Additionally, the administrative law judge accurately noted that Dr. Basheda rejected the idea that coal mine dust exposure and cigarette smoking cause emphysema through similar mechanisms.[10] Decision and Order at 40-41; Employer's Exhibit 10 at 26. The administrative law judge permissibly discredited that reasoning as inconsistent

[9] The record contains three pulmonary function studies in which a bronchodilator was administered (September 9, 2013, February 11, 2016, and March 29, 2016). Each of these studies produced qualifying values both before and after the administration of a bronchodilator. Director's Exhibit 27; Employer's Exhibits 4, 5.

[10] Dr. Basheda indicated that obstructive impairments caused by coal mine dust exposure and cigarette smoking do not occur through "similar mechanisms." Employer's Exhibit 10 at 26.

with the Department of Labor's recognition that coal mine dust-induced and cigarette smoke-induced obstructive impairments occur through similar mechanisms. *Id.*; *see* 20 C.F.R. §718.201(a)(1), (2); 65 Fed. Reg. at 79,943.

As the administrative law judge permissibly discredited the opinions of Drs. Zaldivar and Basheda,[11] the only opinions supportive of a finding that claimant does not have legal pneumoconiosis, we affirm his finding that employer failed to disprove the existence of legal pneumoconiosis. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *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 does not have pneumoconiosis.

The administrative law judge next considered whether employer rebutted the Section 411(c)(4) presumption 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)(ii). The administrative law judge rationally discredited the opinions of Drs. Zaldivar and Basheda that the miner's disability was not due to pneumoconiosis because neither doctor diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013). 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, and affirm the award of benefits. *See* 20 C.F.R. §718.305(d)(1)(ii).

[11] Because the administrative law judge provided valid reasons for according less weight to the opinions of Drs. Zaldivar and Basheda, the administrative law judge's error, if any, in according less weight to their opinions for other reasons, is harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Zaldivar and Basheda.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge