U.S. Department of Labor

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

BRB No. 17-0272 BLA

WILLIAM R. FLUHARTY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DONALDSON MINE COMPANY	)	
	)	DATE ISSUED: 02/28/2018
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2016-BLA-05465) of Administrative Law Judge Thomas M. Burke 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 August 21, 2014.[1]

After crediting claimant with twenty-four years of underground coal mine employment,[2] the administrative law judge found that the evidence established that claimant has 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[3] and established a change in the applicable condition of entitlement. The administrative law judge further determined that employer failed to rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

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]

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

[1] Claimant filed two previous claims, both of which were finally denied. Director's Exhibits 1, 2. Claimant's most recent prior claim, filed on June 5, 2002, was denied by an administrative law judge on April 24, 2006 because the evidence did not establish the existence of pneumoconiosis. Director's Exhibit 2.

[2] The record reflects that claimant's last coal mine employment was in West Virginia. Hearing Transcript at 23. 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).

[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] Because employer does not challenge the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, or his finding that claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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 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 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 he does not have a chronic dust 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, 1-1-55 n.8 (2015) (Boggs, J., concurring and dissenting). In evaluating whether employer met its burden, the administrative law judge considered the medical opinions of Drs. Basheda and Spagnolo, both of whom opined that claimant does not have legal pneumoconiosis.[7] Dr. Basheda opined that claimant suffers from tobacco-induced chronic obstructive pulmonary disease (COPD), with an asthmatic component. Director's Exhibit 22 at 31. Dr. Spagnolo opined that claimant suffers from severe airflow obstruction due to smoking, and possibly from chronic heart disease. Employer's Exhibit 5 at 14-15.

[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 10.

[7] The administrative law judge also considered Dr. Gaziano's opinion. Dr. Gaziano diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease due to both smoking and coal mine dust exposure. Decision and Order at 5; Director's Exhibit 16.

The administrative law judge discounted their opinions because he found that the doctors failed to adequately explain how they eliminated claimant's twenty-four years of coal mine dust exposure as a contributor to his disabling obstructive pulmonary impairment. Decision and Order at 11-13. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis.

Employer initially argues that the administrative law judge applied an improper standard by requiring Drs. Basheda and Spagnolo to "rule out" the existence of legal pneumoconiosis in order to rebut the Section 411(c)(4) presumption. Employer's Brief at 13. We disagree. The administrative law judge correctly stated that employer bore the burden of establishing 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 9-10; *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. Basheda and Spagnolo 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 discounting the opinions of Drs. Basheda and Spagnolo. We disagree. The administrative law judge noted that they both relied, in part, on the partial reversibility of claimant's impairment after the administration of bronchodilator medication to determine that coal mine dust exposure was not a cause of claimant's obstructive impairment. Decision and Order at 11-12. The administrative law judge permissibly found, however, that they did not adequately explain why the remaining irreversible portion of claimant's obstructive pulmonary impairment[8] was not due, in part, to coal mine dust exposure, or why claimant's response to bronchodilators necessarily eliminated a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *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); Decision and Order at 11-12.

[8] The administrative law judge accurately noted that the new pulmonary function studies conducted on October 23, 2014 and April 22, 2015 produced qualifying results both before and after the administration of a bronchodilator. Decision and Order at 4; Director's Exhibits 16, 22.

As the administrative law judge permissibly discredited the opinions of Drs. Basheda and Spagnolo,[9] the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm his finding that employer failed to disprove the existence of legal pneumoconiosis.[10] 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 discounted the opinions of Drs. Basheda and Spagnolo that claimant's disability is not due to pneumoconiosis because neither doctor diagnosed legal pneumoconiosis, contrary

[9] Because the administrative law judge provided a valid reason for according less weight to the opinions of Drs. Basheda and Spagnolo, 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. Basheda and Spagnolo.

[10] The administrative law judge also found that the medical opinion evidence submitted in connection with claimant's prior claims did not assist employer in establishing that claimant does not suffer from legal pneumoconiosis. Decision and Order at 13-15. Employer argues that the administrative law judge erred in his evaluation of the medical opinion evidence from the prior claims. Employer's Brief at 32-33. Employer, however, has not explained how medical evidence from the prior claim, which predates claimant's invocation of the rebuttable presumption of total disability due to pneumoconiosis, is relevant to whether employer has rebutted the presumption. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988) (holding that it is illogical to find rebuttal established based on evidence that predates the evidence on which invocation is based); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982). Thus, the administrative law judge's error, if any, in his consideration of the previously submitted evidence, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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 (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); Decision and Order at 16. 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).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge