U.S. Department of Labor

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

BRB No. 17-0277 BLA

MELYNDIA ANN BRYAN (o/b/o BERT FOWLER BRYAN, deceased) Claimant-Respondent v. ISLAND CREEK COAL COMPANY and WELLS FARGO DISABILITY MANAGEMENT Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/27/2018 DECISION and ORDER

Appeal of the Decision and Order of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2013-BLA-05838) of Administrative Law Judge Peter B. Silvain, Jr., 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 miner's claim filed on July 6, 2010.[1]

Pursuant to employer's stipulation, the administrative law judge credited the miner with at least sixteen years of underground coal mine employment,[2] and found that the evidence established that the miner 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 of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge further found that employer failed to rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption.[4] Claimant responds in support of the

[1] The miner died on July 1, 2012. Director's Exhibit 43. Claimant, the miner's widow, is pursuing the miner's claim. Director's Exhibit 38 at 2. Claimant filed a survivor's claim on December 14, 2012. Director's Exhibit 40. As explained *infra*, n.4, her survivor's claim is not before the Board on appeal.

[2] The miner's most recent coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth 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, or was totally disabled due to pneumoconiosis at the time of death, 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), as implemented by 20 C.F.R. §718.305(b).

[4] Employer argues further that the administrative law judge erred in awarding survivor's benefits to claimant under Section 932(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).

administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief. Employer filed a reply brief, reiterating its contentions on appeal.[5]

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 that the miner was totally disabled due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,[6] 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

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Employer's Brief at 6-7, 22. The administrative law judge's separate decision awarding survivor's benefits, however, is not before the Board. Employer's Notice of Appeal, filed on February 22, 2017, identified the Decision and Order in the miner's claim as the case being appealed and contained its case number only, 2013-BLA-05838. 20 C.F.R. §802.208(a)(4). The Board searched its docket system and found no record of a Notice of Appeal from employer regarding the administrative law judge's Decision and Order in the survivor's claim, 2013-BLA-05839. Therefore, we address only employer's arguments regarding the award of benefits in the miner's claim.

[5] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] "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). "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).

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.[7]

To establish that the miner did not suffer from legal pneumoconiosis, employer must demonstrate that the miner did not have a chronic lung disease or impairment that was "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 medical opinions of Drs. Hippensteel and Tuteur, both of whom opined that the miner did not have legal pneumoconiosis.[8] Specifically, Dr. Hippensteel opined that the miner had chronic bronchitis and chronic obstructive pulmonary disease (COPD) due to cigarette smoking. Employer's Exhibit 4 at 7. Dr. Hippensteel further opined that the miner's respiratory impairment was aggravated by worsening muscle weakness due to myotonic dystrophy,[9] which affected the miner's respiratory muscles. *Id*. Dr. Tuteur opined that the miner suffered from respiratory dysfunction due to myotonic dystrophy, "confounded by" chronic bronchitis and airflow obstruction due to smoking. Employer's Exhibits 5 at 4; 7.

[7] The administrative law judge, however, found that employer established that the miner did not have clinical pneumoconiosis. Decision and Order at 25-28.

[8] The administrative law judge also considered the opinions of Drs. Chavda, Baker, and Houser. Dr. Chavda diagnosed legal pneumoconiosis, in the form of an impairment due to both smoking and coal mine dust exposure. Director's Exhibit 9 at 43. Drs. Baker and Houser also diagnosed legal pneumoconiosis, in the form of chronic bronchitis and chronic obstructive pulmonary disease due to both smoking and coal mine dust exposure. Director's Exhibit 26 at 5; Claimant's Exhibit 3 at 2. All three physicians agreed that muscle weakness from myotonic dystrophy, *see* n.9, *infra*, also contributed to the miner's respiratory impairment, although Dr. Chavda mislabeled the disease as "multiple sclerosis."

[9] "Myotonia" is defined as "dystonia involving increased muscular irritability and contractility with decreased power of relaxation." Dorland's Illustrated Medical Dictionary 1226 (32d ed. 2012). "Myotonic dystrophy" is "a rare, slowly progressive, hereditary disease characterized by myotonia followed by atrophy of the muscles," and other abnormalities. *Id*. at 584. Dr. Tuteur explained that myotonic dystrophy causes progressive muscle weakness that can impair the ability to walk, breathe, and swallow. Employer's Exhibit 6 at 16. It is undisputed that the miner was diagnosed with myotonic dystrophy in 1989. Director's Exhibit 22 at 63.

The administrative law judge discounted the opinions of Drs. Hippensteel and Tuteur, finding that neither physician's opinion was well-reasoned. Decision and Order at 26-29. He therefore concluded that employer failed to establish that the miner did not have legal pneumoconiosis. *Id*. at 28-29.

Employer argues that the administrative law judge applied an improper rebuttal standard by requiring Drs. Hippensteel and Tuteur to rule out any contribution by coal mine dust exposure in order to establish that the miner's respiratory impairment was not legal pneumoconiosis. Employer's Brief at 9, 14-16. We disagree. The administrative law judge correctly stated that employer bore the burden of establishing that the miner did 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 23-24; *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. Hippensteel and Tuteur 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. Hippensteel and Tuteur. Employer's Brief at 18-22. We disagree. The administrative law judge noted Dr. Hippensteel's reasoning that the miner's COPD was due to smoking because symptoms of industrial bronchitis caused by coal mine dust exposure usually subside within a year after the cessation of exposure, and the miner continued to smoke after his coal mine employment ended. Decision and Order at 27; Employer's Exhibit 4 at 7. The administrative law judge permissibly discounted Dr. Hippensteel's opinion because he found the physician's reasoning to be based on generalities, and not specific to the miner's case. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-104 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). Additionally, the administrative law judge permissibly found that Dr. Hippensteel's reasoning was inconsistent with the Department of Labor's recognition that pneumoconiosis is a "latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40, 25 BLR 2-675, 685-87 (6th Cir. 2014).

The administrative law judge also questioned the reasoning underlying Dr. Tuteur's opinion. Dr. Tuteur explained that, although the miner was exposed to sufficient amounts of coal mine dust to produce pneumoconiosis if he were a susceptible host, his clinical picture was typical of that associated with myotonic dystrophy and the effects of smoking. Employer's Exhibits 5 at 4-5; 7 at 11-12, 22-23. The administrative law judge permissibly found that Dr. Tuteur's attempt to distinguish smoking-related and coal mine dust-related lung disease was "unconvincing" in light of the Department of Labor's determination that medical literature supports the theory that both diseases occur through similar mechanisms. Decision and Order at 26, *citing* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). Moreover, the administrative law judge permissibly found that Dr. Tuteur's opinion was inadequately explained because Dr. Tuteur characterized the miner's overall clinical course as "typical" of myotonic dystrophy, but in another part of his opinion stated that the course of that disease is "quite variable among a population of patients . . . ." Employer's Exhibit 7 at 25, 27; *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989).

Based on the foregoing analysis, the administrative law judge concluded that overall, neither Dr. Hippensteel nor Dr. Tuteur adequately explained why he concluded that the miner's years of coal mine dust exposure did not contribute to, or aggravate, his pulmonary impairment, along with smoking and myotonic dystrophy. Decision and Order at 27, 28. Substantial evidence supports the administrative law judge's permissible credibility determination. *See* 20 C.F.R. §718.201(b); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-739-40 (6th Cir. 2015).

Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Hippensteel and Tuteur,[10] the only opinions supportive of a finding that

[10] Because we affirm the administrative law judge's decision to discount the opinions of Drs. Hippensteel and Tuteur for the reasons set forth above, we need not address employer's additional challenges to the administrative law judge's analysis of those opinions. *See Kozele v. Rochester & Pittsburgh Coal Co*., 6 BLR 1-378, 1-382-83 n.4 (1983); Employer's Brief at 20-22. Additionally, we need not address employer's contention that the administrative law judge erred in finding that the miner smoked one pack of cigarettes per day for approximately thirty-eight years. Employer's Brief at 10-14. Although Drs. Hippensteel and Tuteur noted that the reports of the extent of the miner's smoking history varied, Dr. Tuteur explained that even "one pack a day for 39 years" would be a smoking history sufficient to put the miner at "substantial" risk for developing smoking-related lung disease. Employer's Exhibit 7 at 12. Further, the administrative law judge did not credit or discredit any physician's opinion based upon

the miner did not have legal pneumoconiosis,[11] we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

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. Hippensteel and Tuteur that the miner's disability was unrelated 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 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 the miner's respiratory

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his understanding of the miner's smoking history. Thus, employer has not explained how the administrative law judge's reliance on a thirty-eight pack-year smoking history materially affected his evaluation of the medical opinions of Drs. Hippensteel and Tuteur. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the alleged "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[11] We reject employer's argument that the administrative law judge erred in finding that Dr. Chavda's opinion did not support employer's burden to establish that the miner did not have legal pneumoconiosis. Employer's Brief at 16-17. Dr. Chavda diagnosed the miner with "legal pneumoconiosis . . . substantially caused and aggravated by working in the coal mines." Director's Exhibit 9 at 43. Employer, however, points to Dr. Chavda's opinion addressing the cause of total disability, wherein Dr. Chavda stated that legal pneumoconiosis was not the main contributing factor to the miner's impairment, but that smoking and "multiple sclerosis" were the main causes. *Id*. at 1, 44. Nevertheless, Dr. Chavda stated that coal mine dust exposure "may have caused some aggravation of [the miner's] pulmonary disability." *Id*. at 1. Given that it was employer's burden to affirmatively show that the miner did not have legal pneumoconiosis, *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011), substantial evidence supports the administrative law judge's finding that Dr. Chavda's opinion did not support that burden.

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