U.S. Department of Labor

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

BRB No. 18-0129 BLA

TEDDY F. FRAZEE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTHERN OHIO COAL COMPANY	)	DATE ISSUED: 02/26/2019
	)	
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 of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2015-BLA-05696) of Administrative Law Judge Steven D. Bell, rendered 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 claim filed on September 26, 2013.

The administrative law judge found that claimant has at least twenty-four years of underground coal mine employment and a totally disabling pulmonary or respiratory impairment, thus invoking the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer asserts that the administrative law judge erred in finding that it did not rebut the presumed existence of legal pneumoconiosis. Neither claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief.[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, 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).

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that he has neither legal nor clinical pneumoconiosis,[4] or that "no

[1] Under Section 411(c)(4) of the Act, claimant is presumed to be totally disabled 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) (2012); 20 C.F.R. §718.305(b).

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least twenty-four years of underground coal mine employment, a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), and invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2.

[3] Because claimant's last coal mine employment was in Ohio, we 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); Director's Exhibit 3; Hearing Transcript at 8.

[4] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id*. 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

part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that employer failed to establish rebuttal under either method.[5] Decision and Order at 24-25.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, employer must establish that claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered whether the opinions of Drs. Zaldivar and Ghio satisfied employer's burden.[6]

Dr. Zaldivar opined that claimant does not have legal pneumoconiosis, but has emphysema, asthma, and lung cancer due solely to exposure to tobacco smoke and biomass smoke. Director's Exhibit 27; Employer's Exhibit 11. Dr. Ghio opined that claimant has chronic obstructive pulmonary disease (COPD) due entirely to cigarette smoke. Employer's Exhibits 8, 10. The administrative law judge found that both physicians' opinions are poorly reasoned and inadequately explained and, therefore, do not disprove that claimant has legal pneumoconiosis. Decision and Order at 21-24.

---

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).

[5] Pursuant to 20 C.F.R. §718.305(d)(1)(i), the administrative law judge determined that employer rebutted clinical pneumoconiosis, but did not rebut legal pneumoconiosis. Decision and Order at 19, 24.

[6] The administrative law judge also considered Dr. Feicht's opinion that claimant has legal pneumoconiosis in the form of chronic obstructive pulmonary disease and chronic bronchitis, due to both coal mine dust exposure and cigarette smoke. Decision and Order at 20; Director's Exhibits 11, 30. The administrative law judge found Dr. Feicht's opinion well-documented and reasoned but clarified that "even if I were to disregard his opinion, it is the employer's burden to establish that the [c]laimant does not have pneumoconiosis." Decision and Order at 20. Thus, we decline to address employer's allegations of error regarding the administrative law judge's consideration of Dr. Feicht's opinion, as it does not assist employer in establishing rebuttal of the Section 411(c)(4) presumption. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 18-21.

Employer contends that the administrative law judge improperly required its medical experts to provide "strongly persuasive evidence demonstrating the falsity of a presumed fact" and to disprove the "possibility" that coal dust "in any way" contributed to claimant's respiratory impairment. Employer's Brief at 5-17, *quoting* Decision and Order at 20, 24. Employer's contentions lack merit.

Although the administrative law judge used the phrases quoted by employer, he correctly stated that "[r]ebuttal occurs when the Employer establishes that the Claimant does not have clinical or legal pneumoconiosis." Decision and Order at 17, *citing* 20 C.F.R. §718.305. He also accurately cited to cases in which the United States Court of Appeals for the Sixth Circuit, whose law applies in this case, has held that "[e]mployer must affirmatively prove the absence of pneumoconiosis." Decision and Order at 20, *citing Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *Minich*, 25 BLR at 1-154-56. Moreover, he discredited the opinions of employer's experts because their reasoning is flawed, not because they did not meet a specific rebuttal standard. Decision and Order at 21-25; *see Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1073-74 (6th Cir. 2013) (affirming administrative law judge's decision to discredit physicians as insufficiently documented and reasoned where they failed to adequately explain their conclusions).

Dr. Zaldivar opined that the improvement shown on claimant's pulmonary function studies after the administration of a bronchodilator indicates that claimant's COPD with asthma is attributable entirely to tobacco and wood smoke exposure. Director's Exhibit 27; Employer's Exhibit 11. He opined that claimant's lung function improved between the March and October 2014 pulmonary function studies, which represents a "spontaneous change in the breathing capacity" due to asthma; if coal dust were a factor, "there'd be no change in the breathing capacity." Employer's Exhibit at 11 at 24. He also acknowledged that claimant's impairment was not completely reversible after bronchodilators, but stated that this did not undermine his diagnosis because untreated asthma "would remodel the lungs through inflammation" and "remodeled lungs don't respond to bronchodilators acutely." Employer's Exhibit 11 at 24-25, 34. Noting that both the March and October 2014 studies "produced qualifying results before and after the administration of bronchodilators," the administrative law judge permissibly discredited Dr. Zaldivar's opinion because, even if there were a "change" due to asthma, he did not adequately explain why "the remaining residual disabling impairment was not at all related to the [c]laimant's significant history of coal mine dust exposure."[7] *See Kennard*, 790 F.3d at 668; *Crockett*

[7] As the administrative law judge observed, Dr. Zaldivar also relied on the fact that neither of the pathology reports from claimant's lung wedge resections mentioned the presence of dust to conclude claimant does not have legal pneumoconiosis. Decision and

Colleries, Inc. v. Barrett, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 22, 24. We therefore affirm his discrediting of Dr. Zaldivar's opinion. *See Kennard*, 790 F.3d at 668; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002).

The administrative law judge also permissibly found that the reasoning underlying Dr. Ghio's opinion is inadequate. Decision and Order at 23-24. Dr. Ghio noted claimant: "[H]as a severe COPD with a loss in FEV1 of almost 2L (that is almost 2000 mL). There is no study which suggests that coal dust exposure can be associated with such a loss in pulmonary function and such a severe COPD." Employer's Exhibit 10. He also stated, "coal miners can demonstrate a loss of FEV1 which can potentially result in a mild COPD[,]" but coal dust cannot cause moderate or severe obstructive disease of the type suffered by claimant. Employer's Exhibit 8. The administrative law judge permissibly discredited Dr. Ghio's opinion, as it conflicts with the medical science accepted by the Department of Labor recognizing that coal dust exposure can cause a severe obstructive impairment, as evidenced by the fact "nonsmoking miners develop moderate and severe obstruction at the same rate as smoking miners." Decision and Order at 23, *citing* 65 Fed. Reg. 79,938 (Dec. 20, 2000); *see Sterling*, 762 F.3d 483, 491-92; *see also* 65 Fed. Reg. 79,971 (Dec. 20, 2000) (recognizing that coal mine dust can cause clinically significant obstructive lung disease). We thus affirm his discrediting of Dr. Ghio's opinion. *See Kennard*, 790 F.3d at 668; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002).

Finally, employer argues that in finding that it failed to rebut legal pneumoconiosis, the administrative law judge erred in not considering the CT or pathology evidence, which did not include findings of pneumoconiosis. *See* Employer's Brief at 27-28; Decision and Order at 19; Employer's Exhibits 1, 4. We reject employer's contention. The administrative law judge considered the opinions of Drs. Zaldivar and Ghio that the CT and pathology evidence does not support the existence of pneumoconiosis. Decision and Order at 10, 12, *referencing* Employer's Exhibits 8, 10, 11. He permissibly discredited their opinions that claimant's impairment was unrelated to coal dust exposure, however, for the reasons set forth above. Employer has not explained how the administrative law judge's further consideration of the CT evidence would have affected his finding that Drs.

Order at 12; Employer's Exhibit 11 at 105, 120. He stated, "the only way that coal mining can be associated with damage to the lungs is by inhaling mineral dust that is causing ongoing damage in the lungs. So the mineral dust has to be there." Employer's Exhibit 11 at 120; *see* Decision and Order at 12. Dr. Zaldivar conceded, however, that the remainder of claimant's lungs might have contained mineral dust, or the pathologists might not have described the presence of dust because they were not looking for it. Employer's Exhibit 11 at 101, 109-110.

Zaldivar and Ghio did not credibly explain why claimant does not have legal pneumoconiosis. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference.").

Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Zaldivar and Ghio,[8] we affirm his finding that their opinions are insufficient to rebut the existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); *see Sterling*, 762 F.3d at 491-92; *Ogle*, 737 F.3d at 1072; *Minich*, 25 BLR at 1-156.

Total Disability Causation

The administrative law judge next considered whether employer established that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(ii). He permissibly discounted the opinions of Drs. Zaldivar and Ghio because neither physician diagnosed legal pneumoconiosis, contrary to his finding that employer did not disprove the existence of the disease. *See Ogle*, 737 F.3d 1063, 1074; *Ramage*, 737 F.3d 1050, 1062; Decision and Order at 25. We therefore affirm the administrative law judge's determination that employer failed to establish rebuttal of the presumed fact of disability causation. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 25.

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and employer did not rebut the presumption, claimant is entitled to benefits.

[8] Because the administrative law judge provided valid rationales for discrediting the opinions of Drs. Zaldivar and Ghio, we decline to address employer's additional challenges to his weighing of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Employer's Brief at 17-27.

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