U.S. Department of Labor

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

BRB No. 19-0143 BLA

JERRY T. LAWLESS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LODESTAR ENERGY, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 02/20/2020
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	
	)	
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 Awarding Benefits of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

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

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05049) of Administrative Law Judge Jonathan C. Calianos rendered on a claim filed pursuant to 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 October 2, 2013.

The administrative law judge credited claimant with twenty-five years of coal mine employment at underground mines and accepted employer's concession that claimant has a totally disabling respiratory or pulmonary impairment. He therefore found 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).[1] The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding 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 in this appeal.[2] Employer filed a reply brief, reiterating its contentions.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C.

[1] Under Section 411(c)(4) of the Act, claimant is presumed totally disabled due to pneumoconiosis if he has 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); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-five years of qualifying coal mine employment, total disability at 20 C.F.R. §718.204(b)(2), and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

§921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Rebuttal of the Section 411(c)(4) Presumption

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 part of [his] 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 employer did not rebut the presumption by either method.[5]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, employer must establish claimant does not have a chronic lung disease or impairment "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). The United States Court of Appeals for the Sixth Circuit has held that this standard requires employer to "disprove the existence of legal pneumoconiosis by showing that [claimant's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020).

The administrative law judge considered the medical opinions of Drs. Tuteur and Selby.[6] Dr. Tuteur opined claimant does not have legal pneumoconiosis but has totally

[4] 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). This definition encompasses any chronic pulmonary disease or respiratory or pulmonary impairment "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).

[5] The administrative law judge found employer rebutted the presumed existence of clinical pneumoconiosis. Decision and Order at 39; 20 C.F.R. §§718.201(a)(1), 718.305(d)(1)(i)(B).

[6] The administrative law judge also considered the medical opinions of Drs. Chavda and Houser. Decision and Order at 41-42. Dr. Chavda diagnosed legal pneumoconiosis in

disabling chronic obstructive pulmonary disease (COPD) due solely to cigarette smoking. Director's Exhibit 13; Employer's Exhibits 1, 2, 4, 5, 12. Dr. Selby opined claimant does not have legal pneumoconiosis but has severe obstructive lung disease from asthma and emphysema due to cigarette smoke exposure. Employer's Exhibit 9. The administrative law judge found their opinions inadequately explained and therefore insufficient to disprove legal pneumoconiosis. Decision and Order at 46.

Employer argues that the administrative law judge applied an incorrect legal standard in stating that employer bears the burden to "exclude" or "rule out" or establish that "no part" of claimant's coal mine dust exposure caused his respiratory impairment.[7] Employer's Brief at 7-9, *quoting* Decision and Order at 44, 45. Contrary to employer's assertion, the administrative law judge did not find that the opinions of Drs. Tuteur and Selby are insufficient to disprove the existence of legal pneumoconiosis on the basis that they failed to "exclude" or "rule out" coal dust exposure as a causative factor of claimant's respiratory impairment. Decision and Order at 42-46. Rather, he found that their opinions are not credible based on the rationale each physician provided for why claimant does not have legal pneumoconiosis.[8] *Id*.

---

the form of severe chronic obstructive pulmonary disease (COPD)/obstructive airways disease due to claimant's histories of smoking and coal mine employment. Director's Exhibit 12; Claimant's Exhibits 3, 7, 9. Dr. Houser also diagnosed legal pneumoconiosis in the form of severe COPD/emphysema related to smoking and coal mine dust exposure. Claimant's Exhibit 1.

[7] Employer also alleges the administrative law judge erred in crediting Dr. Chavda's and Dr. Houser's diagnoses of legal pneumoconiosis. Contrary to employer's contention, the administrative law judge properly found that their opinions do not assist employer in meeting its burden on rebuttal. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 42.

[8] The administrative law judge initially stated correctly that employer "must establish the absence of any respiratory or pulmonary impairment arising out of coal mine employment, including chronic pulmonary disease resulting from respiratory or pulmonary impairment significantly related to or substantially aggravated by dust exposure in coal mine employment." Decision and Order at 40; *see* 20 C.F.R. §§718.305(d)(1)(i)(A), 718.201(a)(2), (b). He also permissibly found the opinions of Drs. Tuteur and Selby insufficient to establish that claimant's respiratory impairment is not related, at least in part, to his coal mine dust exposure. *See Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020); Decision and Order at 42, 45. Any error in also stating "[e]mployer's burden is not to establish a clinical diagnosis but to exclude coal dust exposure as a factor in [claimant's] disabling respiratory impairment" and referencing the phrases "did not play

The administrative law judge permissibly found neither Dr. Tuteur nor Dr. Selby adequately explained why claimant's coal mine dust exposure was not a factor in his respiratory impairment. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 46. Specifically, he noted Dr. Tuteur acknowledged that inhalation of both tobacco smoke and coal mine dust may produce the COPD phenotype, but excluded coal mine dust-inhalation as a risk factor of claimant's disease. Decision and Order at 43; Director's Exhibit 13; Employer's Exhibits 4, 5. Relying on medical literature, Dr. Tuteur stated that "never mining smokers experience COPD about 20% of the time, while never smoking miners develop COPD only 1% of the time." Employer's Exhibit 12. He then compared the relative risk of COPD among smokers who never mined coal to the risk of nonsmoking coal miners and opined that claimant's disabling COPD is due to tobacco smoke, not coal mine dust. *Id*.

The administrative law judge permissibly found Dr. Tuteur's opinion inadequately reasoned because it is based on "statistical probabilities" rather than claimant's specific condition. Decision and Order at 44; Director's Exhibit 13; Employer's Exhibits 1, 2, 4, 5, 12; *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). The administrative law judge further permissibly found that, even if Dr. Tuteur were correct that coal dust-induced COPD is rare, he did not explain why claimant is not one of the "statistically rare cases." Decision and Order at 44; *see Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255.

Dr. Selby opined that coal mine dust-induced obstructive pulmonary disease is "unusual to exist to the point of clinical limitations." Employer's Exhibit 9. The administrative law judge permissibly discredited Dr. Selby's opinion as inconsistent with the Department of Labor's acceptance of the medical science recognizing that coal mine dust-induced COPD is clinically significant. Decision and Order at 45, *citing* 65 Fed. Reg. 79,920, 79,938 (Dec. 20, 2000); *see Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92 (6th Cir. 2014); *see also* 65 Fed. Reg. at 79,971 (recognizing that coal mine dust can cause clinically significant obstructive lung disease). Further, Dr. Selby

---

a role," "played no part," "did not substantially aggravate" and "was related, in any way," Decision and Order at 44, 45, 46, are harmless, as the administrative law judge ultimately did not reject the opinions of employer's experts for failing to satisfy a particular rebuttal standard. Rather, he concluded that employer's experts did not disprove the existence of legal pneumoconiosis because the bases for their opinions were not credible. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 42-46.

opined that other factors and conditions, such as asthma and emphysema related to cigarette smoke exposure, could fully account for claimant's pulmonary impairment.[9] Employer's Exhibit 9. In light of scientific evidence the Department found credible that smoking and coal dust exposure can be additive risks, the administrative law judge permissibly found that Dr. Selby did not adequately explain why claimant's coal mine dust exposure did not substantially aggravate his impairment. *See* 20 C.F.R. §718.201(a)(2); *Barrett*, 478 F.3d at 356; *Rowe*, 710 F.2d at 255; 65 Fed. Reg. at 79,940; Decision and Order at 44-46. Thus the administrative law judge rationally found the opinions of Drs. Tuteur and Selby insufficient to disprove legal pneumoconiosis. Decision and Order at 46.

Because the administrative law judge rationally discredited the opinions of Drs. Tuteur and Selby,[10] the only medical opinions supportive of employer's burden, we affirm his finding employer did not disprove legal pneumoconiosis. We therefore affirm the administrative law judge's determination employer did not rebut the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether employer established that "no part of [claimant'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). He again permissibly discredited the opinions of Drs. Tuteur and Selby because neither doctor diagnosed legal pneumoconiosis, contrary to his determination that employer failed to disprove that claimant has the disease. *See Big Branch Resources, 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 48. Moreover, employer does not challenge the administrative law judge's determination on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore

[9] Dr. Selby stated, "[t]here is more than enough cause for the bullous emphysema from [claimant's] tobacco smoke exposure." Employer's Exhibit 9. He also stated that coal mine dust exposure "virtually never causes severe bullous disease." *Id*. Further, he stated that claimant's "genetic make-up and contact with the right viral infection" caused his asthma and not coal mine dust-inhalation. *Id*.

[10] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Tuteur and Selby, we need not address employer's remaining arguments regarding the weight accorded to their legal pneumoconiosis opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption at 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.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge