U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 17-0188 BLA

ROLF U. DAMRON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWTON ENERGY, INCORPORATED	)	
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 01/29/2018
	)	
	)	
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 M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2015-BLA-05500) of Administrative Law Judge Richard A. Morgan 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 January 3, 2014.[1]

The administrative law judge credited claimant with nineteen years of underground coal mine employment,[2] and found that the evidence established that he 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,[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 determined that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues 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

[1] Claimant's initial claim, filed on February 11, 1992, was denied by reason of abandonment on August 4, 1992. Director's Exhibit 1. Claimant's second and third claims, filed on July 14, 1994 and July 24, 1997, were denied by the district director on December 22, 1994 and December 1, 1997, respectively, because claimant failed to establish any of the elements of entitlement. Director's Exhibits 2, 3.

[2] The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibit 11. 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.

administrative law judge's 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 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 opinions of Drs. Zaldivar and Basheda, both of whom opined that

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

[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 29.

claimant does not have legal pneumoconiosis.[7] Dr. Zaldivar opined that claimant suffers from asthma and chronic obstructive pulmonary disease (COPD) due to cigarette smoking. Director's Exhibit 20; Employer's Exhibit 8 at 27. Dr. Zaldivar opined that neither of these conditions is due to claimant's coal mine dust exposure. *Id.* Dr. Basheda opined that claimant is suffering from either "persistent asthma," or cigarette smoke-induced obstructive lung disease, neither of which is related to coal mine dust exposure. Employer's Exhibits 5 at 26; 9 at 21.

The administrative law judge discounted their opinions because he found that the doctors failed to adequately explain how they eliminated claimant's nineteen years of coal mine dust exposure as a contributor to his disabling obstructive pulmonary impairment. Decision and Order at 32-33. The administrative law judge additionally found their reasoning at odds with the recognition that pneumoconiosis is a latent and progressive disease which may first become detectable only after cessation of coal dust exposure. *Id.* at 32. 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. Zaldivar and Basheda to "rule out" the existence of legal pneumoconiosis in order to rebut the Section 411(c)(4) presumption. Employer's Brief at 15. We disagree. A review of the administrative law judge's Decision and Order reflects that 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 31; *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.")

[7] The administrative law judge also considered the opinions of Drs. Agarwal and Habre. Drs. Agarwal and Habre diagnosed legal pneumoconiosis, in the form of an obstructive impairment due to both smoking and coal mine dust exposure. Decision and Order at 29-30; Director's Exhibit 19; Claimant's Exhibit 2.

Employer next contends that the administrative law judge failed to provide valid reasons for discounting the opinions of Drs. Zaldivar and Basheda. We disagree. The administrative law judge noted that Drs. Zaldivar and Basheda 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 30-32. The administrative law judge permissibly found that Drs. Zaldivar and Basheda 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 32.

Additionally, the administrative law judge accurately noted that each doctor opined that if claimant's obstructive impairment was attributable to his coal mine dust exposure, claimant's symptoms would have abated, or improved, after claimant ceased his coal mine employment. Decision and Order at 32; Employer's Exhibits 8 at 28-29; 9 at 13. The administrative law judge permissibly discredited that reasoning as 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); Decision and Order at 32. Therefore, we reject employer's argument that the administrative law judge failed to provide valid reasons for discounting the opinions of Drs. Zaldivar and Basheda.

[8] The administrative law judge found that claimant's February 8, 2014 and April 20, 2016 pulmonary function studies "most accurately reflected" claimant's pulmonary capacity. Decision and Order at 31, 35; Director's Exhibit 9; Employer's Exhibit 5. The administrative law judge accurately noted that these studies produced qualifying results both before and after the administration of a bronchodilator. *Id.*

As the administrative law judge permissibly discredited the opinions of Drs. Zaldivar and Basheda,[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. 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. 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 (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 the miner'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).

[9] 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 the 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

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge