U.S. Department of Labor

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

BRB No. 18-0590 BLA

ROY A. YOCUM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNITED MINERALS INCORPORATED	)	DATE ISSUED: 01/16/2020
	)	
and	)	
	)	
CNA INSURANCE COMPANY	)	
	)	
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 Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for claimant.

Walter E. Harding (Boehl Stopher & Graves, LLP), Louisville, Kentucky, for employer/carrier.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-05743) of Administrative Law Judge Colleen A. Geraghty 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 August 30, 2016.

The administrative law judge credited claimant with 19.72 years of surface coal mine employment in conditions substantially similar to those in an underground mine. Because the parties' stipulated to the existence of a totally disabling respiratory or pulmonary impairment, she found claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer contends the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.[2]

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. §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).

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment 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 finding that claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] We will apply the law of the United States Court of Appeals for the Seventh Circuit, as claimant's last coal mine employment occurred in Indiana. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish he has neither legal nor clinical pneumoconiosis[4] or "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 failed to establish rebuttal by either method.

Legal Pneumoconiosis

To establish claimant does not suffer from legal pneumoconiosis,[5] employer must demonstrate he 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, 1-1-55 n.8 (2015) (Boggs, J., concurring and dissenting). In evaluating whether employer met its burden, the administrative law judge considered Dr. Tuteur's opinion that claimant's chronic obstructive pulmonary disease (COPD) is due solely to smoking.[6] Decision and Order at 19-22, 26-27; Employer's Exhibit 1. She found his

[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). The definition includes "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] We affirm, as unchallenged on appeal, the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 24-25, 27.

[6] The administrative law judge also considered the opinions of Drs. Murthy and Krefft diagnosing legal pneumoconiosis. Decision and Order at 26; Director's Exhibit 13; Claimant's Exhibit 1. Neither opinion aids employer in meeting its burden on rebuttal. Thus, we need not address employer's arguments concerning her weighing of these opinions. *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."); Employer's Brief at 7-10.

opinion insufficient to rebut legal pneumoconiosis because it is not well-reasoned. Decision and Order at 26-27. Employer's challenge to that determination lacks merit.

Dr. Tuteur acknowledged claimant's COPD "may be due to either inhalation of coal mine dust or cigarette smoke" because the clinical picture from both causes "is generally similar." Employer's Exhibit 1. He eliminated a contribution from coal dust, however, based on a "relative risk assessment" that smokers who never mined have a higher risk of developing COPD than nonsmoking miners.[7] *Id.* Thus, the administrative law judge permissibly rejected Dr. Tuteur's opinion as based on statistical generalities, rather than the specific facts of this case. *See Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1345-46 (10th Cir. 2014); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735 (7th Cir. 2013); *A & E Coal Co. v. Adams*, 694 F.3d 798, 802-03 (6th Cir. 2012); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 26. Moreover, she permissibly found Dr. Tuteur's opinion not well-reasoned because he "did not explain why [c]laimant could not be one of the statistically rare individuals who develop obstruction as a result of coal mine dust exposure[.]" Decision and Order at 27; *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Knizner*, 8 BLR at 1-7. Thus, the administrative law judge permissibly found Dr. Tuteur failed to adequately explain how he eliminated coal mine dust exposure as a contributor to his disabling obstructive pulmonary impairment, especially given his recognition that the clinical picture of COPD from smoking and coal dust exposure is similar. 65 Fed. Reg. 79,920, 79,938, 79,940 (Dec. 20, 2000); *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); Decision and Order at 27.

Employer's arguments regarding Dr. Tuteur's opinion, the only evidence supportive of rebuttal, amount to little more than a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We affirm, therefore, the administrative law judge's finding that employer failed to rebut the existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 27.

Total Disability Causation

[7] Dr. Tuteur discussed literature supporting his assertion that the relative risk of developing COPD from smoking is twenty percent for persons who smoke throughout their adult life versus coal dust, which is one percent for miners who never smoked. Employer's Exhibit 1. Thus, Dr. Tuteur concluded claimant's clinical picture of COPD is "uniquely due to the chronic inhalation of tobacco smoke, not coal mine dust." *Id.*

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). She permissibly discredited Dr. Tuteur's opinion that claimant's disability is not due to pneumoconiosis because he did not diagnose clinical or legal pneumoconiosis, contrary to her finding that employer failed to disprove the diseases. *See Burris*, 732 F.3d at 735; *Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 890 (7th Cir. 2002); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015), *quoting Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (where physician failed to properly diagnose pneumoconiosis, administrative law judge "may not credit" that physician's opinion on causation absent "specific and persuasive reasons"); Decision and Order at 28. Moreover, employer does not specifically challenge this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Thus, we affirm the administrative law judge's determination that employer did not rebut total disability causation at 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge