U.S. Department of Labor

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

BRB No. 17-0485 BLA

GERALD W. MABE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 07/31/2018
	)	
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 on Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Evan B. Smith (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for claimant.

Paul E. Frampton and Fazal A. Shere (Bowles Rice LLP), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2011-BLA-05913) of Administrative Law Judge Daniel F. Solomon, awarding benefits on a claim filed on July

8, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for a third time.

In his initial Decision and Order issued on March 14, 2013, the administrative law judge determined that the claim was timely filed, and that claimant established entitlement to benefits pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), because employer did not rebut the presumption that claimant is totally disabled due to clinical pneumoconiosis.[1] On appeal, the Board affirmed the administrative law judge's finding that employer did not rebut the presumption with respect to clinical pneumoconiosis but vacated his finding that the claim was timely filed because he applied Board case law that was overturned by the United States Court of Appeals for the Sixth Circuit. *Mabe v. Westmoreland Coal Co.*, BRB No. 13-0316 BLA (Apr. 30, 2014) (unpub). Accordingly, the Board remanded the case for further consideration of the timeliness issue only.

The administrative law judge denied benefits on remand, concluding that claimant did not timely file his claim within three years of receiving a medical determination of total disability due to pneumoconiosis. Claimant appealed and the Board reversed the denial of benefits, holding as a matter of law that the claim was timely filed pursuant to 20 C.F.R. §725.308.[2] *Mabe v. Westmoreland Coal Co.*, BRB No. 15-0028 BLA (Dec. 29, 2015) (unpub.) (Gilligan, J., dissenting).

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant 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. To rebut the presumption, employer must establish that claimant has neither legal nor clinical pneumoconiosis, or that no part of his totally disabling impairment is due to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i), (ii). Because the administrative law judge found that employer did not rebut the presumption with respect to clinical pneumoconiosis, he did not evaluate rebuttal with respect to legal pneumoconiosis. Therefore, on appeal, the Board and the United States Court of Appeals for the Fourth Circuit similarly did not address the issue of whether employer disproved that claimant has legal pneumoconiosis or that legal pneumoconiosis caused his totally disabling impairment.

[2] The Board did not revisit the prior panel's affirmance of the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption with respect to clinical pneumoconiosis.

Employer appealed the Board's decisions to the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises.[3] In an unpublished decision, the court affirmed the Board's holding that the claim was timely filed but vacated the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption because his rejection of the opinions of Drs. Hippensteel and Basheda that claimant does not have clinical pneumoconiosis was not adequately explained in accordance with the Administrative Procedure Act.[4] *Westmoreland Coal Company v. Mabe*, 662 Fed. Appx. 213 (4th Cir. 2016).

Following the Fourth Circuit's decision, the case was returned to the administrative law judge who issued his Decision and Order on Remand dated May 5, 2017, which is the subject of this appeal. The administrative law judge determined that employer failed to establish rebuttal of the Section 411(c)(4) presumption with respect to both clinical and legal pneumoconiosis.

Employer argues that the administrative law judge improperly evaluated the medical opinions of Drs. Hippensteel and Basheda and did not follow the directive of the Fourth Circuit to adequately explain the bases for his credibility determinations. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response unless specifically requested to do so by the Board.

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 presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish

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[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 5; Hearing Transcript at 29.

[4] The Administrative Procedure Act (APA), 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

that claimant has neither legal nor clinical pneumoconiosis,[5] or that "no 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). Because the administrative law judge's findings that employer failed to rebut the presumptions that claimant's chronic obstructive pulmonary disease (COPD) is legal pneumoconiosis and that it played a role in his disability are supported by substantial evidence, we affirm the award of benefits under Section 411(c)(4).[6]

To establish that claimant does not have 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 medical opinions of Drs. Hippensteel and Basheda, both of whom opined that claimant's COPD was unrelated to coal dust exposure. Employer's Exhibits 5, 6.

Contrary to employer's contention, the administrative law judge did not err in finding that these opinions are not persuasive to disprove that claimant has legal pneumoconiosis. The administrative law judge noted correctly that both physicians relied, in part, on the partial reversibility of claimant's impairment after the administration of bronchodilator medication as a basis for excluding coal dust exposure as a causative factor

[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). 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] Although the Fourth Circuit vacated the administrative law judge's finding that employer did not rebut the presumption of clinical pneumoconiosis, employer must disprove both legal and clinical pneumoconiosis in order to establish rebuttal under 20 C.F.R. §718.305(d)(1)(i). Accordingly, as we affirm the administrative law judge's finding that employer did not disprove legal pneumoconiosis, it is not necessary that we address employer's challenges to the administrative law judge's findings on remand as they pertain to clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).

for claimant's COPD.[7] Decision and Order on Remand at 9. Referencing the December 8, 2010 pulmonary function test administered by Dr. Hippensteel, the administrative law judge noted that even after using bronchodilators, "[c]laimant meets disability criteria with his highest FEV1 increasing from 1.81 (50%) to only 2.05 (57%)." *Id.*; *see* Employer's Exhibit 5. The administrative law judge permissibly found that Drs. Hippensteel and Basheda did not adequately explain why the fixed and irreversible component of claimant's obstructive pulmonary impairment, which remained totally disabling after bronchodilators, was not caused by coal dust exposure. *See 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 on Remand at 9. The administrative law judge also permissibly discounted their opinions because they "failed to show that even if [claimant] is obese, has sleep apnea and was a smoker, coal mine dust did not aggravate claimant's impairment." Decision and Order on Remand at 10. In so doing, the administrative law judge reasonably determined that the physicians failed to adequately address the effects of nineteen years of coal dust exposure in reaching their conclusions. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Decision and Order on Remand at 11.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 25 BLR 2-255 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-129-30 (4th Cir. 2012). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to rebut the presumption by disproving the existence

[7] Dr. Hippensteel noted that "partial reversibility and variability of ventilatory function is not suggestive of impairment by [claimant's] prior coal mine dust exposure, which usually causes a fixed and irreversible impairment." Employer's Exhibit 5. He opined that claimant has morbid obesity associated with obstructive sleep apnea and chronic obstructive pulmonary disease (COPD)/chronic bronchitis due to smoking. *Id.* Dr. Basheda similarly opined that claimant's airway obstruction was "most consistent with tobacco-induced COPD with a partially reversible or asthmatic component to his airway *obstruction."* Employer's Exhibit 6.

of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i). *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015).

The administrative law judge next considered whether employer rebutted the 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). In finding that the opinions of Drs. Hippensteel and Basheda were not credible to disprove the presumed fact of disability causation, the administrative law judge correctly noted that neither physician diagnosed legal pneumoconiosis. Decision and Order on Remand at 17. Because the administrative law judge specifically determined that employer did not rebut the presumed fact of legal pneumoconiosis, the administrative law judge rationally rejected their opinions on the cause of the miner's respiratory disability. The Fourth Circuit has held that "an administrative law judge 'may not credit' a physician's opinion on causation absent [a] 'specific and persuasive showing' that it is not linked to an erroneous failure to diagnose pneumoconiosis." *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-505, 25 BLR 2-713, 2-721 (4th Cir. 2015), *quoting Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *Grigg v. Director, OWCP*, 28 F.3d 416, 419, 18 BLR 2-299, 2-306 (4th Cir. 1994) (a medical opinion premised on an erroneous finding that a miner did not have pneumoconiosis is "not worthy of much, if any, weight" on the issue of disability causation).

Further, applying the same rationale he used for discrediting the opinions of Drs. Hippensteel and Basheda on the etiology of claimant's COPD or legal pneumoconiosis, the administrative law judge permissibly found that "their unjustifiable reliance on the effects from bronchodilation on pulmonary function studies" precluded reliance on their opinions as to the cause of claimant's *disabling* COPD. Decision and Order at 14; *see Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Swiger*, 98 F. App'x at 237. Because the administrative law judge gave rational reasons for concluding that the opinions of Drs. Hippensteel and Basheda were not persuasive to satisfy employer's burden of proof, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis.[8] *See* 20 C.F.R. §718.305(d)(1)(ii); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21

[8] As noted, because employer failed to disprove that claimant has legal pneumoconiosis, or that his total disability is due to legal pneumoconiosis, claimant is entitled to benefits. 20 C.F.R. §718.305(d)(1)(i), (ii). We therefore need not address employer's argument that the administrative law judge erred in finding that employer failed to establish that no part of claimant's respiratory disability was due to clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278.

BLR at 2-275-76. We therefore affirm the administrative law judge's finding that claimant is entitled to benefits.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge