U.S. Department of Labor

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

BRB No. 18-0421 BLA

JAMES G. HENSLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LESLIE RESOURCES, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 07/19/2019
SECURITY INSURANCE COMPANY OF HARTFORD	)	
	)	
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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-5352) of Administrative Law Judge Steven D. Bell, rendered on a subsequent claim filed on January 15, 2016,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012). The administrative law judge found claimant established twenty-one years of surface coal mine employment, working in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Thus, he found claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4)(2012),[2] and established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. He 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 presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[3]

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] Claimant filed a prior claim on September 3, 2002, which was finally denied on May 28, 2013, for failure to establish the existence of pneumoconiosis and disability causation. 20 C.F.R. §§718.202(a), 718.204(c); Director's Exhibit 1.

[2] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption that he is 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.

[3] We affirm, as unchallenged, the administrative law judge's findings that claimant established twenty-one years of qualifying surface coal mine employment, total disability pursuant to 20 C.F.R. §718.204(b)(2), invocation of the Section 411(c)(4) presumption, and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983);

[4] Because claimant's coal mine employment was in Kentucky, this case arises within the jurisdiction 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 1.

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 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 [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1). The administrative law judge found employer failed to establish rebuttal by either method.[6]

I. 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." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found employer failed to satisfy its burden because the opinions of its medical experts are not adequately reasoned. Contrary to employer's arguments, we see no error in the administrative law judge's credibility findings.

Dr. Broudy opined claimant's disabling chronic obstructive pulmonary disease (COPD) was not related to coal dust exposure because obstructive airways disease is "typical" of impairment due to smoking. Employer's Exhibits 1, 6. He stated claimant's morbid obesity and heavy smoking history provided "ample" explanation for his respiratory impairment. Employer's Exhibit 6. The administrative law judge rationally found that even if claimant had a greater chance of developing respiratory impairment from

[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 administrative law judge found that employer disproved clinical pneumoconiosis, Decision and Order at 19, employer must also disprove legal pneumoconiosis in order to rebut the presumption under the first method at 20 C.F.R. §718.305(d)(1).

smoking, Dr. Broudy "did not address the additive effects of [claimant's] significant history of coal mine dust exposure" and smoking to his COPD. Decision and Order at 20-21; *see* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007). We see no error in the administrative law judge's conclusion that Dr. Broudy's opinion is not reasoned on the issue of legal pneumoconiosis, as he failed to adequately explain why claimant's COPD was not significantly related to, or substantially aggravated by, coal mine dust exposure. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 20.

The administrative law judge also permissibly found Dr. Dahhan's opinion not persuasive to the extent he relied on "relative statistical risks" in excluding coal dust exposure as a causative factor for claimant's respiratory impairment.[7] Decision and Order at 21; *see Barrett*, 478 F.3d at 356; *A & E Coal Co. v. Adams*, 694 F.3d 798, 802-03; *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Director's Exhibit 10. The administrative law judge permissibly discredited his opinion for failing to "discuss the additive effects of coal mine exposure, or explain why, even if the primary cause of [claimant's] COPD was his cigarette smoking, his significant history coal mine dust exposure did not play a role." Decision and Order at 21; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

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. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-7 (6th Cir. 2013); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002). Because the administrative law judge permissibly discredited the opinions of Drs. Dahhan and Broudy, we affirm the administrative law judge's findings that employer failed to disprove legal pneumoconiosis and did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).

[7] Dr. Dahhan diagnosed disabling chronic obstructive pulmonary disease (COPD) due entirely to smoking and opined that claimant's pulmonary impairment has not resulted from inhalation of coal dust. Director's Exhibit 10. He stated claimant's "loss of FEV1" on pulmonary function testing "cannot be accounted for by the obstructive impact of coal dust on the respiratory system[,] which is estimated in the literature to be 5-9 cc per year of coal dust exposure[,] leading me to search for other causes" for claimant's respiratory impairment. *Id*.

II. Disability Causation

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 permissibly discounted the opinions of Drs. Broudy and Dahhan because neither doctor diagnosed legal pneumoconiosis, contrary to his determination that employer failed to disprove that claimant has the disease.[8] *See Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013). Employer raises no specific challenge to the administrative law judge's finding on disability causation, other than to argue that claimant does not have legal pneumoconiosis. Having rejected employer's arguments on legal pneumoconiosis, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[8] Drs. Broudy and Dahhan opined that claimant's respiratory disability is unrelated to legal pneumoconiosis but offered no explanation for their conclusions other than their belief that claimant's COPD did not constitute legal pneumoconiosis. Director's Exhibit 10; Employer's Exhibits 1, 6.