U.S. Department of Labor

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

BRB No. 14-0382 BLA

HENRY CHERRY, III	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CHEVRON MINING, INCORPORATED	)	DATE ISSUED: 06/29/2015
	)	
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 Awarding Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

John R. Jacobs (Maples, Tucker & Jacobs, LLC), Birmingham, Alabama, for claimant.

John W. Hargrove (Bradley Arant Boult Cummings LLP), Birmingham, Alabama, for employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-05838) of Administrative Law Judge Adele Higgins Odegard, rendered on a subsequent claim filed on January 31, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (the Act).[1] The administrative law judge credited claimant with seventeen years and nine months of underground coal mine employment

[1] Claimant filed his first claim on May 11, 2006. Director's Exhibit 1. By order dated January 9, 2008, the administrative law judge granted claimant's request to

and found that he established a totally disabling pulmonary impairment at 20 C.F.R. §718.204(b)(2). The administrative law judge concluded, therefore, that claimant invoked the amended Section 411(c)(4) presumption.[2] 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305. The administrative law judge further found that employer failed to rebut the presumption. Accordingly, benefits were awarded.

On appeal, employer alleges that the administrative law judge erred in finding that it failed to rebut the amended Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response, unless specifically requested to do so by the Board. Employer has filed a reply brief, reiterating its contentions on appeal.

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are 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).

Initially, we affirm the administrative law judge's findings that claimant established fifteen or more years of underground coal mine employment, total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b)(2), and that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis, pursuant to amended Section 411(c)(4), as those findings are unchallenged by employer on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order 19, 23. In addition, because the administrative law judge found that the newly submitted evidence was sufficient to establish total pulmonary disability pursuant to 20 C.F.R.

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withdraw his claim. *Id.* Claimant filed a second claim on September 18, 2008, which was denied by the district director on September 29, 2009, because claimant did not establish any of the elements of entitlement. Director's Exhibit 2.

[2] Under amended Section 411(c)(4), claimant can invoke a rebuttable presumption of total disability 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), as implemented by 20 C.F.R. §718.305.

[3] The record reflects that claimant's coal mine employment was in Alabama. Director's Exhibits 4, 7, 10. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

§718.204(b)(2), claimant established at least one of the elements of entitlement upon which the prior denial was based, thereby establishing a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c); *see U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 23 BLR 2-213 (11th Cir. 2004); *White v. New White Coal Co*., 23 BLR 1-1 (2004).

Upon invocation of the amended Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by affirmatively establishing either that claimant does not have legal and clinical pneumoconiosis,[4] or that no part of claimant's disabling respiratory or pulmonary impairment was caused by pneumoconiosis as defined in 20 C.F.R. §718.201. 20 C.F.R. §725.305(d)(1); *see West Virginia CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011). The administrative law judge determined that the preponderance of the radiological evidence was negative for clinical pneumoconiosis. Decision and Order at 19, 27. With regard to the medical opinion evidence, the administrative law judge discredited the opinions of employer's physicians, who attributed claimant's totally disabling pulmonary impairment to factors unrelated to coal mine employment. *Id*. at 24-27. Based on her credibility determinations, the administrative law judge concluded that employer failed to affirmatively disprove both the existence of legal pneumoconiosis and the presumed causal relationship between claimant's pneumoconiosis and his total pulmonary disability. *Id*. at 27.

Employer alleges that the administrative law judge erred in requiring it to establish that there is "no evidence whatsoever" that claimant has legal pneumoconiosis, rather than applying a preponderance of the evidence standard. Employer's Brief in Support of Petition for Review at 10. Employer further asserts that the administrative law judge relied on selectively isolated statements and portions of the reports of Drs. Bailey and Goldstein in rejecting their opinions that claimant does not have pneumoconiosis and is not totally disabled by the disease. Employer also contends that the administrative law judge ignored the overwhelming evidence that claimant's pulmonary impairment was caused by smoking and treatment for his lung cancer. In addition, employer alleges that the administrative law judge erred in relying on the opinion of Dr. Barney, who diagnosed a totally disabling respiratory impairment caused, in part, by coal dust

[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). "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).

exposure, after performing the Department of Labor-sponsored physical examination of claimant. Finally, employer argues that the administrative law judge did not consider the second method of rebuttal after finding that employer failed to rebut the presumed existence of legal pneumoconiosis. Employer's Brief in Support of Petition for Review at 12. Employer's contentions are without merit.

Rebuttal under 20 C.F.R. §718.305(d)(1)(i)(A) requires employer to affirmatively establish that claimant does not have legal pneumoconiosis, i.e., a "chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §§718.201(a)(2), 718.305(d)(1)(i)(A). Contrary to employer's allegation, the administrative law judge did not require employer to prove that there is "no evidence whatsoever" of legal pneumoconiosis. Employer's Brief in Support of Petition for Review at 12. Rather, the administrative law judge considered the opinions of employer's physicians, Drs. Bailey and Goldstein, and determined that neither physician provided a well-reasoned and well-documented opinion as to whether claimant's coal mine dust exposure contributed to his disabling pulmonary impairment. Decision and Order at 26-27; Director's Exhibit 13; Employer's Exhibits 2, 7.

With respect to Dr. Bailey's written report, the administrative law judge observed correctly that he did not address the issue of legal pneumoconiosis, and focused "principally on negative x-rays" and the issue of whether claimant has clinical pneumoconiosis.[5] Decision and Order at 26. The administrative law judge acted within her discretion in rejecting Dr. Bailey's deposition testimony, that claimant's chronic obstructive pulmonary disease is due entirely to smoking, because she found that he did not quantify claimant's smoking history, and offered no explanation for why claimant's coal dust exposure during his nearly eighteen years of coal mine employment did not

[5] Dr. Bailey reviewed medical evidence provided to him by employer's counsel and submitted a report dated January 23, 2013. Employer's Exhibit 2. Dr. Bailey summarized claimant's recent medical history in the first paragraph of his report and indicated in the final sentence of that paragraph that claimant's "well-established smoking history is responsible for the two lung cancers and his [chronic obstructive pulmonary disease (COPD)] with airflow obstruction producing shortness of breath." *Id.* In the remainder of his report, Dr. Bailey observed that virtually all of claimant's x-rays and CT scans were negative for coal workers' pneumoconiosis. *Id.* He further indicated that "the only mention of coal workers' pneumoconiosis as a diagnostic entity was given by Dr. Jeff Hawkins, but in the same reports he indicated that the chest radiographs showed only a mass consistent with [claimant's] lung cancer." *Id.* Dr. Bailey concluded that claimant "does not have coal workers' pneumoconiosis." *Id.*

contribute to his disabling obstructive impairment.[6] *See* 20 C.F.R. §718.201(b); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013) (Niemeyer, J., concurring).

Furthermore, the administrative law judge acted within her discretion in finding Dr. Goldstein's opinion to be insufficient to disprove that claimant has legal pneumoconiosis.[7] *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989). The administrative law judge observed correctly that, while Dr. Goldstein stated that claimant's disabling obstruction is "consistent with" smoking and loss of lung volume secondary to surgery, he "did not articulate how the [c]laimant's lung surgery played a role in [c]laimant's pulmonary impairment." Decision and Order at 26-27; *see Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460, 12 BLR 2-371, 2-375 (11th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 151 (1989) (en banc); Director's Exhibit 13. The administrative law judge also noted that Dr. Goldstein identified a "restrictive" respiratory impairment, based on claimant's lung volumes, but did not address whether that impairment was related to coal dust exposure. Decision and Order at 26; *see Clark*, 12 BLR at 1-151.

The persuasiveness of a medical opinion is a matter for the administrative law judge to decide, and the Board is not empowered to reweigh evidence nor substitute its inferences for those of administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985). Because the administrative law judge permissibly discredited the opinions of Drs. Bailey and Goldstein, as "not well-reasoned and not well-documented," we affirm her finding

[6] At his deposition, which was taken on January 23, 2013, the same date as his medical report, Dr. Bailey reiterated that claimant has COPD, that the vast majority of imaging was negative for coal workers' pneumoconiosis, and that claimant is currently a non-smoker, but has a "long-standing history" of smoking. Employer's Exhibit 7 at 28-31. Dr. Bailey further stated that it was his opinion that claimant does not have coal workers' pneumoconiosis, and that his multiple cancers and COPD are not related to coal mine employment. *Id.* at 32.

[7] Dr. Goldstein examined claimant on November 28, 2011, and prepared a report on the same date. Director's Exhibit 13. Dr. Goldstein diagnosed moderate to severe obstruction, based on claimant's pulmonary function study and stated, "the findings on this study are consistent with smoking and loss of lung volume secondary to surgery." *Id.* Dr. Goldstein further indicated that claimant does not have coal workers' pneumoconiosis, but suffers from hypertension, elevated cholesterol, gastroesophageal reflux disease, peripheral vascular disease, COPD, cancer of the lung, and reduction in lung volume due to resection of the lung. *Id.* Dr. Goldstein also opined that claimant may have coronary artery disease. *Id.*

that employer failed to disprove the presumed existence of legal pneumoconiosis. Decision and Order at 27; *see Jones*, 386 F.3d at 992, 23 BLR at 2-238. Accordingly, we affirm, as supported by substantial evidence, the administrative law judge's finding that employer failed to establish the first method of rebuttal at 20 C.F.R. §718.305(d)(1)(i). *Bender*, 782 F.3d at 135; *Morrison*, 644 F.3d at 479-30, 25 BLR at 2-8-9.

Lastly, although the administrative law judge failed to separately evaluate the evidence relevant to the second method of rebuttal at 20 C.F.R. §718.305(d)(1)(ii), employer has not explained why the administrative law judge's error requires remand. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Based on the administrative law judge's permissible determination that the opinions of Drs. Bailey and Goldstein are not adequately reasoned and documented as to the etiology of claimant's disabling pulmonary impairment, they could not be credited as affirmatively establishing that no part of claimant's respiratory or pulmonary disability is due to pneumoconiosis as defined in 20 C.F.R. §718.201. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1069, 25 BLR 2-431, 2-446-47 (6th Cir. 2013). Thus, the administrative law judge's omission of an explicit, and separate, consideration of the evidence under 20 C.F.R. §718.305(d)(1)(ii) does not affect the validity of her ultimate determination that employer did not rebut the presumed fact that claimant's total pulmonary disability was caused by pneumoconiosis as defined in 20 C.F.R. §718.201(a).[8] *See Bender*, 782 F.3d at 135; *Morrison*, 644 F.3d at 479-30, 25 BLR at 2-8-9; Decision and Order at 26-27.

[8] Because employer bears the burden of proof on rebuttal, and we affirm the administrative law judge's discrediting of employer's evidence, it is not necessary that we reach employer's argument with respect to the weight accorded Dr. Barney's opinion that claimant is totally disabled due, in part, to coal dust exposure. *See West Virginia CWP Fund v. Bender*, 782 F.3d 129, 135, BLR (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011).

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge