U.S. Department of Labor

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

BRB No. 15-0367 BLA

CHARLES SIMPSON, JR. (DECEASED)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WAYCO LIMITED PARTNERSHIP NO. 1	)	
	)	
and	)	DATE ISSUED: 06/30/2016
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Appeal of the Decision and Order Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Jonathan C. Masters (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-5708) of Administrative Law Judge Richard A. Morgan (the administrative law judge) rendered on a miner's claim filed on August 4, 2011, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited the miner with twenty-three years of qualifying coal mine employment, based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence established total respiratory disability pursuant to 20 C.F.R. §§718.204(b)(2)(i), (ii), (iv) and 718.204(b)(2) overall. Consequently, the administrative law judge found that claimant[1] established invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge further found that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that it failed to establish rebuttal of the presumption. Specifically, employer asserts that the administrative law judge erred in finding that it failed to disprove the existence of legal and clinical pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.[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 into the

[1] The miner died on November 27, 2015. Rachel Shannon Dotson is pursuing the claim as the administrator of the miner's estate. *Simpson v. Wayco Limited Partnership No. 1*, BRB No. 15-0367 BLA (Mar. 16, 2016) (Order).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where claimant establishes at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, and thus that claimant established invocation of the rebuttable presumption at Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The record indicates that the miner was last employed in the coal mining industry

Act 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 of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of legal pneumoconiosis and clinical pneumoconiosis, or by proving that no part of the miner's 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 that employer failed to establish rebuttal by either method.

In finding that employer failed to disprove the existence of legal pneumoconiosis, the administrative law judge considered Dr. Gaziano's opinion that the miner had some obstructive and restrictive impairment due to coal workers' pneumoconiosis and cigarette smoking, and Dr. Fino's opinion that the miner had severe pulmonary emphysema due to cigarette smoking, and not coal dust exposure.[5] Director's Exhibit 12; Employer's Exhibit 7. The administrative law judge found that Dr. Gaziano's opinion is well-reasoned and documented; by contrast, the administrative law judge found that Dr. Fino's opinion is not well-reasoned. Thus, the administrative law judge found that employer failed to disprove the existence of legal pneumoconiosis.

Employer argues that the administrative law judge erred in discounting Dr. Fino's opinion, asserting that "[the administrative law judge] seems to oversimplify Dr. Fino's opinion regarding the FEV1/FVC ratio." Employer's Brief at 12. Employer avers that Dr. Fino's consideration of the miner's testing values and pattern of impairment were based on more recent medical studies than those "that were available at the time the 2000 Preamble was written." *Id*. at 15. We reject employer's arguments.

Several federal courts of appeals, and the Board, have held that an administrative law judge may evaluate expert opinions in conjunction with the preamble to the 2001

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in West Virginia. Director's Exhibit 3. 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 (1989) (en banc).

[5] The administrative law judge also considered treatment records from March 6, 2011 through March 8, 2011, November 29, 2011 through December 29, 2011, and February 5, 2013 through August 28, 2014. Claimant's Exhibit 1; Employer's Exhibits 5, 6. The administrative law judge found that the treatment records did not disprove the existence of pneumoconiosis. Decision and Order at 24. This finding is affirmed, as it is unchallenged by employer on appeal. *See Skrack*, 6 BLR at 1-711.

regulations, as it sets forth the Department of Labor's (the Department's) resolution of questions of scientific fact relevant to the elements of entitlement. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313, 25 BLR 2-115, 2-129-30 (4th Cir. 2012); *see also A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). In this case, the administrative law judge permissibly discounted Dr. Fino's opinion as being inconsistent with the Department's position that a reduced FEV1/FVC ratio may support a finding that a miner's respiratory impairment is due to coal dust exposure.[6] *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); 20 C.F.R. §718.204(b)(2)(i)(C); *Looney*, 678 F.3d at 311-12, 25 BLR at 2-125; *see also Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11.

Contrary to employer's assertion, the fact that Dr. Fino cited more recent medical literature did not require the administrative law judge to conclude that advancements in science have negated the medical literature addressing the effects of coal mine dust exposure on the lungs that was accepted by the Department in the preamble. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013) (observing that neither of the employer's medical experts "testified as to scientific innovations that archaized or invalidated the science underlying the [p]reamble"). Moreover, the administrative law judge permissibly discounted Dr. Fino's opinion "because Dr. Fino [did] not adequately explain why coal dust exposure [did] not relate to or aggravate the [miner's] pulmonary impairment."[7] Decision and Order at 25.

[6] The administrative law judge noted that "[Dr. Fino] opined that [the miner's] reduced FEV1/FVC ratio is consistent with that of a smoker . . . , and concluded this indicates [the miner's] impairment is only caused by smoking." Decision and Order at 25. The administrative law judge determined, however, that Dr. Fino's opinion is inconsistent with the regulations because "[t]he regulations recognize that coal dust exposure can cause obstructive lung disease, as indicated by the FEV1/FVC ratio . . . ." *Id*.

[7] The administrative law judge noted that "Dr. Fino relied on several studies that indicate that smoking is very detrimental to respiratory health, qualifying arterial blood gas studies, qualifying pulmonary function testing, and [the miner's] smoking history and coal dust exposure." Decision and Order at 25. The administrative law judge also noted that "Dr. Fino provided a thorough synopsis of medical literature, described his agreement with the scientific conclusions of the medical literature and cited to several studies which show that smoking causes more damage than previously thought." *Id*. However, the administrative law judge determined that Dr. Fino, "[i]n his summaries of the studies included in his opinion, [] failed to connect how smoking preclude[d] coal

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); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because the administrative law judge acted within his discretion in evaluating the credibility of Dr. Fino's opinion, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-275-76 (4th Cir. 1997), we reject employer's assertion that the administrative law judge erred in discounting his opinion.[8] We therefore affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis.[9] 20 C.F.R. §718.305(d)(1)(i).

Further, as employer has not challenged the administrative law judge's finding that it failed to prove that no part of the miner's totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis, that finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.305(d)(1)(ii). Consequently, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption.

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dust exposure as aggravating pulmonary impairment in general." *Id*. The administrative law judge additionally determined that "[Dr. Fino] also failed to explain why the coal dust exposure is not significantly related to or why it has not aggravated [the miner's] pulmonary condition." *Id*.

[8] Because the administrative law judge permissibly discounted Dr. Fino's opinion, the only medical opinion of record that could support a finding that employer disproved the existence of legal pneumoconiosis, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2- 323 (4th Cir. 1998), we need not address employer's contention that the administrative law judge erred in finding that Dr. Gaziano's opinion is well-reasoned. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[9] We note that employer must establish the absence of both legal *and* clinical pneumoconiosis to satisfy the first prong of rebuttal at 20 C.F.R. §718.305(d)(1)(i). Because employer's failure to establish the absence of legal pneumoconiosis precludes it from disproving the existence of pneumoconiosis, we need not address its contention that the administrative law judge erred in finding that it failed to disprove the existence of clinical pneumoconiosis.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge