U.S. Department of Labor

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

BRB No. 16-0502 BLA

ROGER DALE CONLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MURRIELL-DON COAL, INCORPORATED, C & D MINING	)	DATE ISSUED: 06/20/2017
	)	
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 Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Paul E. Jones and Denise Hall Scarberry (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-05805) of Administrative Law Judge Patrick M. Rosenow, rendered on a claim filed on June 6, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with

twenty-six years of coal mine employment,[1] at least fifteen years of which took place in underground coal mines. Additionally, the administrative law judge accepted employer's stipulation that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Based on those findings, and the filing date of the claim, the administrative law judge determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption.[3] Claimant has not filed a response to employer's appeal. The Director, Office of Workers' Compensation Programs, has declined to file a brief 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 Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[4] or by

[1] Claimant's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, 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).

[2] Under Section 411(c)(4), 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), as implemented by 20 C.F.R. §718.305.

[3] 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).

[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

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)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

In determining whether employer established that claimant does not have legal pneumoconiosis,[5] the administrative law judge considered the medical opinions of Drs. Broudy and Dahhan. Both physicians opined that claimant does not have legal pneumoconiosis, but suffers from a severe obstructive ventilatory impairment that is due solely to smoking. Director's Exhibit 17; Employer's Exhibit 1. The administrative law judge discounted the opinions of Drs. Broudy and Dahhan on several grounds, finding that neither physician's opinion was well-reasoned. Decision and Order at 14-16. He therefore concluded that employer failed to establish that claimant does not have legal pneumoconiosis.

Employer argues that the administrative law judge improperly discredited the medical opinions of Drs. Broudy and Dahhan. Employer's Brief at 10-11. We disagree.

The administrative law judge found that the opinions of Drs. Broudy and Dahhan that claimant does not have legal pneumoconiosis were not well-reasoned. Specifically, the administrative law judge considered Dr. Broudy's opinion that claimant's impairment seen on pulmonary function testing is unrelated to coal mine dust exposure because it is partially reversible after the administration of bronchodilators. The administrative law judge discounted Dr. Broudy's opinion, finding that he did not adequately address "the etiology of the fixed portion of [c]laimant's impairment that does not benefit from bronchodilator treatment." Decision and Order at 15. The administrative law judge also found that Dr. Broudy did not adequately explain why claimant's years of coal mine dust exposure did not contribute to, or aggravate, claimant's impairment. *See* 20 C.F.R. §718.201(b)(including within the definition of legal pneumoconiosis any chronic pulmonary disease or respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment"). Further, the administrative law judge found Dr. Dahhan's reasoning that coal mine dust causes only a

---

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] The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis. Decision and Order at 13-14.

trivial loss in FEV1 compared to the loss due to smoking to be at odds with the medical science credited by the Department of Labor in the preamble to the 2001 regulatory revisions, indicating that "[e]ven in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction . . . . The risk is additive with cigarette smoking." Decision and Order at 16 & n.52, *quoting* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000).

Although employer argues, generally, that the "evidence . . . supports a finding that . . . [c]laimant does not have legal pneumoconiosis," Employer's Brief at 11, we conclude that the administrative law judge's findings and credibility determinations were permissible and are supported by substantial evidence. *See A&E Coal Co. v. Adams*, 694 F.3d 798, 801, 25 BLR 2-203, 2-210 (6th Cir. 2012)(holding that administrative law judge may consult the medical science set forth in the preamble to assess the credibility of medical opinions); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007)(holding that administrative law judge permissibly found physician did not adequately explain why miner's "responsiveness to treatment with bronchodilators . . . eliminated a finding of legal pneumoconiosis"); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983)(explaining that the determination of whether a medical report is sufficiently reasoned is a credibility matter for the factfinder to decide). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis[6] and, therefore, did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).

Employer next contends that the administrative law judge did not adequately address whether employer established rebuttal by showing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Employer's Brief at 11-12. Contrary to employer's contention, the administrative law judge permissibly found that the same reasons for which he discredited the opinions of Drs. Broudy and Dahhan that claimant's disabling impairment does not constitute legal pneumoconiosis also undercut their opinions that no part of claimant's disabling impairment was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-741 (6th Cir. 2015); *Skukan v. Consolidated Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vacated sub nom.*,

[6] Because we affirm the administrative law judge's decision to discount the opinions of Drs. Broudy and Dahhan for the reasons specified above, we need not address employer's argument that the administrative law judge erred in discounting their opinions for other reasons. Employer's Brief at 10; *see Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-3 n.4 (1983).

Consolidation Coal Co. v. Skukan, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); Decision and Order at 17. Therefore, we affirm the administrative law judge's finding that employer failed to prove that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in 20 C.F.R. §718.201, and affirm the determination that employer did not rebut the Section 411(c)(4) presumption.[7]

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

[7] We need not address employer's contention that the administrative law judge failed to make a sufficiently specific finding regarding the length of claimant's smoking history. Employer's Brief at 7-8. We have affirmed the administrative law judge's decision to discount the opinions of Drs. Broudy and Dahhan for the reasons discussed above. Therefore, any error in the administrative law judge's finding that claimant smoked "at least one pack [of cigarettes] per day for 24 years," Decision and Order at 4, would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).