U.S. Department of Labor

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

BRB No. 16-0505 BLA

WILMA L. ALEXANDER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INCORPORATED/WALTER ENERGY, INCORPORATED	)	DATE ISSUED: 06/26/2017
	)	
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 Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

John R. Jacobs and J. Thomas Walker (Maples, Tucker & Jacobs, LLC), Birmingham, Alabama, for claimant.

John C. Webb V, and Aaron D. Ashcraft (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-BLA-05054) of Administrative Law Judge Lystra A. Harris, rendered on a subsequent miner's claim filed on September 10, 2012, pursuant to the provisions of the Black Lung Benefits Act,

as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge credited claimant with at least nineteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and found that the new evidence was sufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[2] The administrative law judge therefore found that claimant invoked the rebuttable presumption that she is totally disabled due to pneumoconiosis pursuant to Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012), and established a change in an applicable condition of entitlement under 20 C.F.R. §725.309.[3] The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption by proving that no part of claimant's

[1] Claimant filed her initial claim for benefits on October 27, 1999, but withdrew the claim on March 20, 2000. Director's Exhibit 1. Claimant filed a claim on May 5, 2010, which was denied by the district director on November 29, 2010, because claimant did not establish any element of entitlement. Director's Exhibit 2. The record does not show that claimant took any further action on her 2010 claim prior to filing the current subsequent claim.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those of an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). In this case, claimant's second claim for benefits was denied because she failed to establish any element of entitlement. Therefore, claimant was required to establish at least one element in order to obtain a merits review of her subsequent claim based on the newly submitted evidence. *See White*, 23 BLR at 1-3.

totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to employer's appeal. Employer has filed a reply brief reiterating its arguments.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[5] 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).

Once claimant established invocation of the Section 411(c)(4) presumption, the burden shifted to employer to affirmatively establish that claimant has neither legal nor clinical pneumoconiosis, or 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); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-698 (4th Cir. 2015); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 726, 25 BLR 2-405, 2-413 (7th Cir. 2013); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer failed to establish rebuttal by either method.

The only allegation of error that employer raises on appeal is that the administrative law judge erred in finding that Dr. Zaldivar's opinion was insufficient to

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least nineteen years of qualifying coal mine employment, total disability at 20 C.F.R. §718.204(b)(2), a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and invocation of the presumption at Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We also affirm, as unchallenged, the administrative law judge's determination that employer failed to establish rebuttal of the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B). *Id*.

[5] The record reflects that claimant's coal mine employment was in Alabama. Director's Exhibits 5, 9. 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, 1-202 (1989) (en banc).

affirmatively prove that pneumoconiosis played no part in claimant's total respiratory or pulmonary disability pursuant to 20 C.F.R §718.305(d)(1)(ii). Employer argues that the administrative law judge mischaracterized Dr. Zaldivar's opinion when considering the issue of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[6] Employer notes the administrative law judge's statement that:

> Dr. Zaldivar based his conclusion on the fact that Claimant's blood gas study results were normal and, thus, her lungs must be small or unable to expand due to a previous back injury. There is nothing in the regulations, however, that requires that a Claimant demonstrate qualifying values on both pulmonary function studies and blood gas studies. In addition, Dr. Zaldivar's conclusion that Claimant's lungs must be small or unable to expand due to previous back injury is not supported by the extensive treatment records which do not note either of these as possibilities for the long standing treatment for shortness of breath.

Employer's Petition for Review and Brief at 3, *quoting* Decision and Order at 13-14. Employer maintains that the administrative law judge erred in finding that Dr. Zaldivar required claimant's blood gas studies to be qualifying[7] before he would identify coal dust exposure as a cause of claimant's restrictive impairment and further erred in finding that the treatment records do not corroborate his attribution of the impairment to claimant's back injury.

As an initial matter, we note that employer's arguments on appeal concern the administrative law judge's discrediting of Dr. Zaldivar's opinion as to the source of claimant's restrictive impairment. Employer's Petition for Review and Brief at 3-5. These arguments are more properly considered in the context of rebuttal of the existence of legal pneumoconiosis, because determining whether employer has satisfied its burden under 20 C.F.R. §718.305(d)(1)(i) "provide[s] a framework for the analysis of the credibility of the medical opinions at 20 C.F.R. §718.305(d)(1)(ii), the second rebuttal prong." *See Minich*, 25 BLR at 1-159. Indeed, employer acknowledges in its reply brief

[6] However, employer does not allege error in the administrative law judge's finding that claimant established total disability under 20 C.F.R. §718.204(b)(2). Employer states, "Dr. Zaldivar acknowledged that the Claimant does not have the pulmonary capacity to perform her last coal mine employment." Employer's Petition for Review and Brief at 3; Employer's Exhibit 2 at 6.

[7] A qualifying blood gas study produces values that are equal to or less than the table values set forth in Appendix C to 20 C.F.R. Part 718. 20 C.F.R. §718.204(b)(2)(ii).

that "Dr. Zaldivar's opinion was offered, not to rebut the finding of a totally disabling pulmonary impairment, but instead to offer an explanation of the cause of the Claimant's impairment." Employer's Reply to Response to Petition for Review and Brief at 2. We therefore address employer's allegations of error under 20 C.F.R. §718.305(d)(1)(i)(A) and hold that they are without merit.

Dr. Zaldivar reviewed claimant's medical records and stated that only the pulmonary function studies conducted on March 29, 2011, included lung volume testing, which showed a pure restrictive impairment without air trapping. Employer's Exhibit 2. Dr. Zaldivar stated:

> With this kind of pulmonary function testing, *one would expect, if the lungs were abnormal due to a pulmonary fibrosis for example, that the blood gases would deteriorate with exercise.* But, in fact, the blood gases improved with exercise, which is a normal response to exercise.
> …
>
> From a pulmonary standpoint, [claimant] does not have the ventilatory capacity to do heavy labor, but this is at her advanced age of 74 years of age and after a back injury. It is my opinion that [claimant's] breathing capacity is reduced for those two reasons and not because of any intrinsic pulmonary impairment.

Employer's Exhibit 2 (emphasis added). The administrative law judge reviewed Dr. Zaldivar's opinion under 20 C.F.R. §718.305(d)(1)(i)(A) and permissibly discredited it, as Dr. Zaldivar focused on whether claimant's normal blood gas studies were consistent with the presence of a pulmonary fibrosis, when the definition of legal pneumoconiosis includes "any chronic lung disease or *impairment*, and its sequelae arising out of coal mine employment" and "any chronic *restrictive* or obstructive pulmonary disease arising out of coal mine employment."[8] 20 C.F.R. §718.201(a)(2) (emphasis added); *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-258 (4th Cir.

[8] In contrast, clinical pneumoconiosis is defined at 20 C.F.R. §718.201(a)(1) as "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) (emphasis added). The regulatory definition includes, but is not limited to, "coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive *pulmonary fibrosis*, silicosis or silicotuberculosis, arising out of coal mine employment." *Id*. (emphasis added).

2013) (Traxler, C.J., dissenting) ("[The] regulations make clear that the absence of clinical pneumoconiosis cannot be used to rule out legal pneumoconiosis."). The administrative law judge also acted rationally in discrediting Dr. Zaldivar's opinion because, in finding that claimant does not have pulmonary fibrosis, Dr. Zaldivar relied "on negative chest x-ray readings which are outweighed by the positive x-ray readings of record." Decision and Order at 20; *see Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985).

We also reject employer's contention that the administrative law judge erroneously found that the treatment records do not support Dr. Zaldivar's opinion that a back injury caused the restrictive impairment revealed on the March 29, 2011 pulmonary function study by reducing the size of her lungs or preventing their full expansion. Employer maintains that the administrative law judge ignored the fact that the treatment records contain x-ray readings observing the presence of a compression fracture of claimant's spine. *See* Director's Exhibit 3; Claimant's Exhibits 2, 3. Contrary to employer's allegation, however, the administrative law judge did not find that there was no evidence of a back injury in the treatment records. Rather, she permissibly determined that because the treatment records "do not note" reduced lung size or expandability caused by a back injury "as possibilities for the long[-]standing treatment for [claimant's] shortness of breath," the records do not support Dr. Zaldivar's opinion.[9] Decision and Order at 13-14; *see United States Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992, 23 BLR 2-213, 2-238 (11th Cir. 2004); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460, 12 BLR 2-371, 2-374-75 (11th Cir. 1989).

[9] The treatment records date from 1987 to 2014 and reflect a history of chronic obstructive pulmonary disease. Employer's Exhibit 3. The treatment records also include references to claimant's back injury postdating the 2011 pulmonary function study Dr. Zaldivar relied on to diagnose a restrictive impairment caused by the back injury. In a hospital admission summary from August 25, 2012, Dr. Toma reported that claimant fractured two ribs on the right side of her chest in a fall. *Id*. at 1183-1186. In a report dated November 1, 2012, Dr. Toma stated that a "diagnostic study" done on October 1, 2012, showed a fracture of claimant's mid-thoracic spine, and that an MRI was ordered "in light of [claimant's] recent fall." *Id*. at 172. Dr. Toma reported that the MRI showed a mid-thoracic spine compression fracture and stated that claimant was referred for treatment of back pain. *Id*. In a November 28, 2012 report, Dr. Toma noted claimant's statement that her back pain had resolved. *Id*. at 199. The records also contain Dr. Goodwin's reading of an x-ray dated September 26, 2013, as showing a compression fracture of the spine and indicating that the fracture was absent on an August 11, 2010 x-ray. *Id*. at 773.

In asserting that Dr. Zaldivar's opinion was credible to establish that claimant does not have pneumoconiosis and is not totally disabled due to pneumoconiosis, employer is asking for a reweighing of the evidence, which the Board is not empowered to perform. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co*., 12 BLR 1-20, 1-22 (1988). Because employer has not raised any meritorious allegations of error, we affirm the administrative law judge's finding that Dr. Zaldivar's opinion is insufficient to rebut the existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A). We therefore further affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption under 20 C.F.R. §718.305(d)(1)(i). *See Bender*, 782 at 137, 25 BLR at 2-698; *Burris*, 732 F.3d at 726, 25 BLR at 2-413; *Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

Upon considering rebuttal at 20 C.F.R. §718.305(d)(1)(ii), the administrative law judge found that Dr. Zaldivar's opinion was insufficient to establish that no part of claimant's total respiratory or pulmonary disability was caused by pneumoconiosis. Decision and Order at 19-20. The administrative law judge based her finding on the fact that, contrary to her determinations, Dr. Zaldivar concluded that claimant does not have legal or clinical pneumoconiosis. *Id*. We affirm the administrative law judge's weighing of Dr. Zaldivar's opinion based on our affirmance of the administrative law judge's finding that employer failed to rebut the existence of both legal and clinical pneumoconiosis. *See Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-474 (6th Cir. 2013); *Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002). We therefore further affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii). *See Bender*, 782 at 137, 25 BLR at 2-698; *Burris*, 732 F.3d at 726, 25 BLR at 2-413; *Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge