U.S. Department of Labor

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

BRB No. 16-0534 BLA

HAROLD W. FORREN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MEADOW RIVER COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 06/20/2017
	)	
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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Joseph Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, 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/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-05552) of Administrative Law Judge Scott R. Morris rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on March 4, 2013.[1]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with twenty-eight years of underground coal mine employment, as stipulated by the parties, and found that the new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).[3] The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge applied an incorrect standard in considering whether employer rebutted the Section 411(c)(4) presumption.

[1] Claimant filed three previous claims, which were all finally denied. Director's Exhibits 1-3. Claimant's most recent prior claim, filed on May 20, 2010, was denied by the district director on February 24, 2011 for failure to establish the existence of a totally disabling respiratory impairment and that he was totally disabled due to pneumoconiosis. Director's Exhibit 3.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the 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) (2012); *see* 20 C.F.R §718.305.

[3] Where 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). The administrative law judge found that although the precise basis of the prior denial was unclear, as the new evidence established all elements of entitlement, claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). Decision and Order at 6 n.7.

Further, employer asserts that the administrative law judge erred in weighing the medical opinion evidence relevant to rebuttal. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.[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 rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 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 rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[6] or by 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).

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

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 2-4.

[6] "'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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "'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).

On the issue of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Zaldivar, Bellotte, and Crisalli.[7] Each physician opined that claimant does not have legal pneumoconiosis but suffers from an obstructive impairment primarily due to asthma, unrelated to coal mine dust exposure. The administrative law judge found that neither Dr. Zaldivar nor Dr. Bellotte adequately explained why coal mine dust exposure "played no part" in the development of claimant's obstructive impairment. Decision and Order at 29. Similarly, the administrative law judge found that Dr. Crisalli failed to adequately explain why claimant's objective test results "necessarily ruled out coal mine dust exposure" as a factor in claimant's obstructive impairment. Decision and Order at 30.

Employer argues that the administrative law judge erred by requiring its experts to "rule out" or conclude that "no part" of claimant's impairment was due to coal mine dust. Employer's Brief at 6. Thus, employer contends that the award of benefits should be reversed. *Id*. at 18. We disagree.

Employer concedes that the administrative law judge "cite[d] the appropriate standard regarding legal pneumoconiosis." Employer's Brief at 17-18. Specifically, he recognized that in order to rebut the presumed existence of legal pneumoconiosis, employer must disprove the existence of "all lung diseases that are significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 27. Moreover, contrary to employer's assertion, the administrative law judge did not determine that the opinions of Drs. Zaldivar, Bellotte, and Crisalli are insufficient to disprove the existence of legal pneumoconiosis on the basis that they failed to "rule out" coal dust exposure as a causative factor for claimant's respiratory impairment. Decision and Order at 27-30. Rather, the administrative law judge considered the explanations given by Drs. Zaldivar, Bellotte, and Crisalli for why *they* each excluded coal mine dust exposure as a causative factor for claimant's impairment, and he found their opinions not credible. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504, 25 BLR 2-713, 2-720 (4th Cir. 2015); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997); Decision and Order at 27-30. Thus, we reject employer's argument that the administrative law judge applied an improper rebuttal standard relevant to the existence of legal pneumoconiosis.

[7] The administrative law judge also considered the opinions of Drs. Klayton and Cordasco, that claimant suffers from legal pneumoconiosis, and correctly found that they do not assist employer in establishing rebuttal. Decision and Order at 27; Director's Exhibit 15; Claimant's Exhibit 3.

We also reject employer's argument that the administrative law judge erred in discrediting the "comprehensive" and "extensively well-reasoned" opinions of Drs. Zaldivar, Bellotte, and Crisalli that claimant's obstructive impairment is not due to coal mine dust exposure.[8] Employer's Brief at 16-19. The administrative law judge noted that Dr. Zaldivar opined that claimant's symptoms and the reversibility of his obstructive impairment made a diagnosis of asthma a "certainty." Decision and Order at 14; Employer's Exhibit 1 at 5. Dr. Bellotte also diagnosed claimant with asthma, a condition he stated is not caused by coal dust exposure, based on claimant's symptoms and the reversible pattern of his impairment. Employer's Exhibit 4 at 2-3. Both physicians stated that although claimant's impairment was not completely reversible, this did not undermine their diagnoses of asthma because a severe or undertreated asthmatic may develop airway obstruction which is only partially irreversible, through the process of airway remodeling. Employer's Exhibits 1 at 5; 3 at 4; 4 at 3.

Contrary to employer's contention, the administrative law judge permissibly discounted the opinions of Drs. Zaldivar and Bellotte because they did not adequately explain why claimant's twenty-eight years of coal mine dust exposure did not contribute, along with claimant's other conditions, to his disabling obstructive impairment. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); Decision and Order 31-32. Specifically, the administrative law judge rationally discounted the explanations of Drs. Zaldivar and Bellotte that the irreversible portion of claimant's obstructive impairment is attributable to airway remodeling, because neither physician cited to any objective evidence to support his conclusion that such remodeling

[8] Dr. Zaldivar opined that claimant does not have legal pneumoconiosis but suffers from an obstructive pulmonary impairment due to longstanding untreated asthma, complicated by smoking and second-hand smoke exposure. Decision and Order at 13-16; Director's Exhibit 33; Employer's Exhibit 3. Dr. Zaldivar based his opinion, in part, on the reversible nature of claimant's obstructive impairment. *Id.* Dr. Bellotte attributed claimant's obstructive impairment to poorly controlled asthma, and to cardiac problems, and not to coal mine dust exposure. Decision and Order at 17-19, 28; Employer's Exhibit 4. Specifically, Dr. Bellotte explained that the variability and significant reversibility of claimant's impairment following bronchodilator treatment is entirely consistent with asthma, and is uncharacteristic of pneumoconiosis, which causes a fixed, irreversible impairment. Employer's Exhibit 4 at 2-3, 5. Dr. Crisalli similarly attributed claimant's obstructive respiratory disability to asthma based on his partially reversible obstruction, normal diffusion capacity and normal response to exercise, and opined that asthma "is not caused by or related to coal dust exposure." Director's Exhibit 2 (Crisalli Report of June 11, 2007 at 9-10); Decision and Order at 22, 28, 30.

had occurred. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; Decision and Order at 22-23; Employer's Exhibit 5 at 9-10. The administrative law judge further permissibly found that, even if airway remodeling had occurred, neither Dr. Zaldivar nor Dr. Bellotte adequately explained why the fixed portion of claimant's obstructive impairment is due entirely to remodeling of the lungs, or why coal mine dust exposure could not have been a contributory factor. *See Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *see also Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; Decision and Order at 28-29. As the administrative law judge provided valid bases for discrediting the opinions of Drs. Zaldivar and Bellotte, these findings are affirmed. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 27-29.

The administrative law judge also considered the 2006 opinion of Dr. Zaldivar, and the 2007 opinion of Dr. Crisalli, submitted with claimant's second claim. Decision and Order at 29-30. The administrative law judge noted that, in his earlier opinion, in addition to relying on the reversible nature of claimant's obstructive impairment, Dr. Zaldivar opined that if coal dust exposure had contributed to the impairment he would expect to see changes on x-ray. Decision and Order at 29-30; Director's Exhibit 2 (Dr. Zaldivar's 2007 deposition at 24-25). The administrative law judge permissibly discredited Dr. Zaldivar's opinion, in part, as inconsistent with the regulations that permit a determination of the existence of pneumoconiosis, even without a positive x-ray. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); 20 C.F.R. §718.202(a)(4), (b); Decision and Order at 29-30.

Finally, the administrative law judge noted that Dr. Crisalli, like Drs. Zaldivar and Bellotte, opined that claimant's obstructive impairment is due to asthma "which is not in any way related to coal dust exposure." Decision and Order at 30; Director's Exhibit 2. Dr. Crisalli relied, in part, on the pattern of claimant's impairment, reflecting "marked improvement after bronchodilators, and the diffusion capacity is always normal," to conclude that claimant's impairment is not due to coal dust exposure. Decision and Order at 30; Director's Exhibit 2 (Dr. Crisalli's 2007 report at 9, Dr. Crisalli's 2007 deposition at 29, 34-35). The administrative law judge permissibly discounted Dr. Crisalli's opinion, in part, because Dr. Crisalli's rationale did not account for the fact that claimant's two most recent diffusion capacity test results demonstrated reduced values. *See Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986) (administrative law judge may assign less weight to physician's opinion which reflects an incomplete picture of miner's health); Decision and Order at 30. Based on the foregoing credibility determination, which is supported by substantial evidence, we conclude that the administrative law judge reasonably discounted Dr.

Crisalli's medical opinion. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Kozele*, 6 BLR at 1-382 n.4.

Because the opinions of Drs. Zaldivar, Bellotte, and Crisalli are the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). Finally, as employer does not contest the administrative law judge's finding that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by his pneumoconiosis, we affirm the administrative law judge's conclusion that employer failed to rebut the Section 411(c)(4) presumption. 30 U.S.C §921(c)(4); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 30-31.

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