U.S. Department of Labor

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

BRB No. 16-0555 BLA

JIMMY MAGGARD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Joseph E. Allman (Allman Law LLC), Indianapolis, Indiana, for claimant.

Paul E. Frampton (Bowles Rice LLP), Charleston, West Virginia, for employer.

Helen H. Cox (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-BLA-05765) of Administrative Law Judge Alice M. Craft, rendered on a claim filed on October 2, 2013, 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 "more than" fifteen years of underground coal mine employment,[1] Decision and Order at 15, and found that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found 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 argues that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption.[3] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's argument that the administrative law judge applied an improper rebuttal standard by referring to the preamble to the 2001 regulatory revisions.

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).

[1] Claimant was last employed in the coal mining industry in Virginia. Claimant's Exhibit 8 at 14. 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, 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).

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 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. Decision and Order at 19-24.

In determining whether employer established that claimant does not have legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Tuteur and Zaldivar.[5] Both physicians opined that claimant does not have legal pneumoconiosis, but suffers from an obstructive ventilatory impairment that is due to factors other than coal mine dust exposure. Director's Exhibit 19; Employer's Exhibits 1, 3, 4. Specifically, Dr. Tuteur diagnosed claimant with chronic obstructive pulmonary disease (COPD) due solely to smoking and a history of childhood pneumonia. Employer's Exhibits 1, 3. Dr. Zaldivar diagnosed claimant with "bronchospastic disease of the lungs" due to asthma unrelated to coal mine dust exposure, but related to a history of cigarette smoking, and possibly, childhood pneumonia. Director's Exhibit 19 at 3-4; Employer's Exhibit 4 at 27-34.

The administrative law judge found that Dr. Tuteur's opinion was not well-reasoned because it was based on generalities, not consistent with medical science set forth in the preamble to the regulations, and did not adequately address whether claimant's years of coal mine dust exposure contributed to, or aggravated, that impairment. Decision and Order at 21-22. The administrative law judge also found that Dr. Zaldivar's opinion was not well-reasoned, because Dr. Zaldivar did not credibly explain how he determined that claimant's years of coal mine dust exposure did not contribute to, or aggravate, claimant's obstructive lung disease and asthma. Decision and

[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).

[5] The administrative law judge also considered Dr. Houser's opinion diagnosing claimant with legal pneumoconiosis, and noted that it did not assist employer in rebutting the Section 411(c)(4) presumption. Decision and Order at 11, 23; Director's Exhibit 11.

Order at 23. The administrative law judge therefore found that employer failed to establish that claimant does not have legal pneumoconiosis.

Employer contends that the administrative law judge applied an improper rebuttal standard by automatically rejecting, as contrary to the preamble, its physicians' opinions because they concluded that claimant's obstructive impairment is unrelated to coal mine dust exposure. Employer's Brief at 3-5, 17, 22-23. This contention lacks merit. In evaluating expert medical opinions, an administrative law judge may consult the preamble as a statement of medical studies found credible by the Department of Labor (DOL) when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, 25 BLR 2-255, 2-264-65 (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314, 25 BLR 2-115, 2-130 (4th Cir. 2012). Here, contrary to employer's contention, the administrative law judge did not use the preamble as a legal rule or presumption that all obstructive lung disease is pneumoconiosis. *See Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32. Rather, the administrative law judge correctly recognized that whether a particular miner's COPD arose out of "coal mine employment or smoking must be resolved on a claim-by-claim basis," and she explained that she "considered how to weigh the conflicting medical opinions in this case" in light of the medical science discussed in the preamble. Decision and Order at 21; *see* 65 Fed. Reg. 79,920, 79,938 (Dec. 20, 2000); *Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32. We therefore reject employer's contention that the administrative law judge misapplied the preamble.

Employer argues further that the administrative law judge substituted her judgment for that of the physicians when she discounted the opinions of Drs. Tuteur and Zaldivar that claimant does not have legal pneumoconiosis. Employer's Brief at 17-20. We disagree.

As was summarized by the administrative law judge, Dr. Tuteur opined that it is "highly unlikely" that coal mine dust exposure contributed to claimant's COPD. Employer's Exhibit 1 at 6. Citing medical literature, Dr. Tuteur explained that 20% of "never-mining cigarette smokers" develop COPD, and that this percentage "increases . . . in persons with a history of early childhood pneumonias." *Id*. at 4. In contrast, according to Dr. Tuteur, non-smoking miners develop COPD 1% of the time. *Id*. at 4-5; Employer's Exhibit 3 at 12-14, 26. Contrary to employer's argument, the administrative law judge permissibly found that Dr. Tuteur's opinion was not well-reasoned because it was "based on generalities, rather than specifically focusing on [claimant's] condition . . . ." Decision and Order at 21; *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103-04 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). Further, the administrative law judge permissibly found that, even if she accepted Dr. Tuteur's statistical reasoning, the physician's opinion was

not persuasive because Dr. Tuteur did not address a study cited by DOL in the preamble to the 2001 revised regulations, which states that the "incidence of [non-smoking] coal miners with intermediate dust exposure developing moderate obstruction . . . is roughly equal to the incidence of moderate obstruction in smokers with no mining exposure (15.5% v. 17.1%)."[6] Decision and Order at 21-22, *quoting* 65 Fed. Reg. at 79,940; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-75-76 (4th Cir. 1997).

In addition, the administrative law judge noted that Dr. Tuteur "compar[ed] only non-mining smokers to non-smoking miners," and thus did not address miners such as claimant who were exposed to both coal mine dust and cigarette smoke. Decision and Order at 22. In light of the definition of legal pneumoconiosis, the administrative law judge rationally found that Dr. Tuteur did not adequately "explain why [claimant's] significant coal mine dust exposure was not a contributing or aggravating factor" in his COPD, along with his history of smoking.[7] *Id*.; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; 20 C.F.R. §718.201(b)(including within legal pneumoconiosis "any chronic . . . respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment").

As was also summarized by the administrative law judge, Dr. Zaldivar opined that there was no evidence of legal pneumoconiosis, but that claimant has "bronchospastic disease" due to asthma which, according to Dr. Zaldivar, is not the kind of impairment that is caused by coal mine dust exposure. Director's Exhibit 19 at 3-4; Employer's

[6] The administrative law judge also noted that the study states that "the incidence of non-smoking miners with intermediate exposure developing severe airways obstruction (FEV1 of less than 65%) is equal to the incidence of severe obstruction in non-mining smokers (5.0% for both groups)." Decision and Order at 21, *quoting* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000).

[7] In addition to considering the definition of legal pneumoconiosis when assessing the credibility of Dr. Tuteur's opinion, the administrative law judge reasonably considered medical studies endorsed by the Department of Labor in the preamble stating that the effect of coal mine dust exposure is additive to that of smoking. *See Energy W. Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 828-29 (10th Cir. 2017); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314, 25 BLR 2-115, 2-130 (4th Cir. 2012); Decision and Order at 21-22 & n.58, *citing* 65 Fed. Reg. at 79,940 (Dec. 20, 2000).

Exhibit 4 at 30-37. In light of the definition of legal pneumoconiosis, the administrative law judge permissibly found that Dr. Zaldivar did not adequately explain "why [claimant's] history of coal [mine] dust exposure . . . did not substantially aggravate the asthmatic component of his impairment . . . ." Decision and Order at 23; *see Owens*, 724 F.3d at 558, 25 BLR at 2-353; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; 20 C.F.R. §718.201(b).

Substantial evidence supports the administrative law judge's credibility determinations, and the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). We therefore affirm the administrative law judge's finding that employer failed to disprove legal pneumoconiosis[8] at 20 C.F.R. §718.305(d)(1)(i).[9]

Employer also argues that the administrative law judge erred in finding that employer failed to establish rebuttal by establishing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(ii). We disagree. The administrative law judge rationally discounted the opinions of Drs. Tuteur and Zaldivar because neither physician diagnosed the miner with legal pneumoconiosis, and she found no "specific and persuasive reasons" for concluding that their opinions on the issue of disability causation were independent of their opinions regarding the existence of pneumoconiosis. Decision and Order at 24; *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). We therefore affirm 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 pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

[8] Employer argues that Dr. Houser's opinion diagnosing claimant with legal pneumoconiosis is not well-reasoned. Employer's Brief at 14-16. Dr. Houser's opinion does not assist employer in establishing rebuttal of the Section 411(c)(4) presumption, Decision and Order at 23, and the administrative law judge did not rely upon Dr. Houser's opinion when she found that the opinions of Drs. Tuteur and Zaldivar were not sufficiently credible to establish that claimant does not have legal pneumoconiosis. Therefore, we need not address employer's arguments regarding Dr. Houser's opinion.

[9] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Therefore, we need not address employer's arguments regarding the administrative law judge's finding that employer also failed to disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 5-10.

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