U.S. Department of Labor

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

BRB No. 16-0619 BLA

CHARLES P. OOTEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOUNTAINEER COAL DEVELOPMENT COMPANY	)	DATE ISSUED: 06/20/2017
	)	
and	)	
	)	
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 the Decision and Order of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin and M. Rachel Wolfe (Wolfe, Williams & Reynolds), Norton, Virginia, for claimant.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2014-BLA-05801) of Administrative Law Judge Drew A. Swank awarding benefits 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 September 13, 2013.[1]

The administrative law judge credited claimant with over fifteen years of qualifying coal mine employment,[2] and found that the evidence established that he suffers from 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 Section 411(c)(4) presumption[3] and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). The administrative law judge further determined that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions.[4]

[1] Claimant's initial claim, filed on December 7, 2009, was denied by the district director on August 18, 2010, because claimant failed to establish that he was totally disabled due to pneumoconiosis. Director's Exhibit 1.

[2] The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibit 1. 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).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more 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 impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption, and that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[5] 20 C.F.R. §718.305(d)(1)(i), 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)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer argues that the administrative law judge erred in finding that it failed to disprove the existence of clinical pneumoconiosis. In addressing whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge initially considered the x-ray evidence, including interpretations of x-rays taken on November 14, 2013, April 16, 2014, March 17, 2015, and February 4, 2016. Although the administrative law judge found that the November 14, 2013, April 16, 2014, and March 17, 2015 x-rays were negative for pneumoconiosis, he found that the most recent x-ray taken on February 4, 2016 was positive for pneumoconiosis.[6] Decision and Order at 14-15. Because the most recent x-ray was positive for pneumoconiosis, the administrative law judge found that the x-ray evidence established the existence of pneumoconiosis. *Id.*

In finding that the x-ray evidence established the existence of clinical pneumoconiosis, the administrative law judge permissibly credited the most recent x-ray evidence: the positive interpretation of the February 4, 2016 film. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992) (recognizing that the "later evidence is better" rule is properly applied where the miner's condition has worsened); Decision and

[5] "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).

[6] Dr. DePonte, a B reader and Board-certified radiologist, interpreted the February 4, 2016 x-ray as positive for pneumoconiosis, and there were no contrary readings. Claimant's Exhibit 5; Decision and Order at 15.

Order at 15. We therefore affirm the administrative law judge's determination that the x-ray evidence does not assist employer in establishing that claimant does not have clinical pneumoconiosis.[7]

The administrative law judge also considered the medical opinion evidence. Although Drs. Zaldivar and Rosenberg opined that claimant does not suffer from clinical pneumoconiosis, Employer's Exhibits 8, 9, the administrative law judge accurately noted that their opinions were based, in part, upon negative x-ray interpretations. Decision and Order at 21. Because the administrative law judge found that the x-ray evidence established the existence of clinical pneumoconiosis, the administrative law judge permissibly questioned the documentation underlying the opinions of Drs. Zaldivar and Rosenberg.[8] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); Decision and Order at 21.

[7] In summarizing his weighing of the x-ray evidence, the administrative law judge stated that the x-ray evidence "does support a finding of a no clinical pneumoconiosis." Decision and Order at 15. Employer asserts that '[t]his wording reads as if [the administrative law judge] determined that the x-ray evidence does not support a finding of clinical pneumoconiosis." Employer's Brief at 7. We agree with employer that the sentence is confusing. However, based upon the administrative law judge's crediting of the most recent x-ray, which was read only as positive, it is apparent that the sentence contains a typographical error, i.e., the inadvertent inclusion of the words "a no" before clinical pneumoconiosis. The administrative law judge also subsequently stated, in his weighing of the medical opinion evidence, that he found "that the [x]-ray evidence does support the existence of pneumoconiosis." Decision and Order at 21.

[8] Employer argues that it was irrational for the administrative law judge to discredit the opinions of Drs. Zaldivar and Rosenberg for relying upon the negative chest x-ray interpretations associated with their examinations of claimant, because the administrative law judge found those individual chest x-rays to be negative for pneumoconiosis. Employer's Brief at 9. Contrary to employer's assertion, the administrative law judge discredited the opinions of Drs. Zaldivar and Rosenberg, not because they relied upon a single negative chest x-ray, but because they based their opinions upon the assumption that "the totality of the [x]-ray evidence was negative." Decision and Order at 21. Moreover, the administrative law judge determined that the physicians failed to explain why they credited the older negative readings over the more recent and uncontradicted positive interpretation. *Id.* Dr. Zaldivar opined that claimant did not suffer from clinical pneumoconiosis, based upon his interpretation and the interpretations of "other readers." Employer's Exhibit 8 at 23. Dr. Rosenberg opined that the "totality" of the chest x-ray evidence did not demonstrate the presence of clinical pneumoconiosis. Employer's Exhibit 9 at 20.

We therefore affirm the administrative law judge's finding that the medical opinion evidence fails to establish that claimant does not have clinical pneumoconiosis.

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 clinical pneumoconiosis. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis.[9] 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Employer also argues that the administrative law judge erred in finding that employer failed to establish rebuttal by showing that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis.[10] 20 C.F.R. §718.305(d)(1)(ii). We disagree. The administrative law judge rationally discounted the opinions of Drs. Zaldivar and Rosenberg that claimant's disability was not caused by pneumoconiosis because the physicians did not diagnose clinical pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 30-31. We therefore affirm the administrative law judge's determination 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).

[9] Therefore, we need not address employer's contentions of error regarding the administrative law judge's findings with respect to the existence of legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[10] Employer contends that the administrative law judge improperly required it to establish that no part of claimant's respiratory or pulmonary disability was caused by coal mine dust exposure, rather than by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). As we explain above, however, the administrative law judge reasonably discredited the disability causation opinions of Drs. Zaldivar and Rosenberg. Thus, any error by the administrative law judge in citing an incorrect rebuttal standard was harmless. *See Larioni*, 6 BLR at 1-1278.

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, claimant has established his entitlement to benefits.

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

JONATHAN ROLFE
Administrative Appeals Judge