U.S. Department of Labor

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

BRB Nos. 16-0669 BLA
16-0669 BLA-A

JERRY F. WESTFALL	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
UPSHUR COALS CORPORATION	)	
	)	DATE ISSUED: 06/28/2017
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits (2014-BLA-05717) of Administrative Law Judge Richard A. Morgan 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 miner's claim filed on October 7, 2013.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[1] the administrative law judge credited claimant with at least thirty years of qualifying coal mine employment, based on the parties' stipulation. The administrative law judge also accepted employer's concession that claimant is totally disabled and, therefore, found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis. The administrative law judge further found 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 weighing the medical opinion evidence in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. Claimant has also filed a cross-appeal contending that, if the award of benefits is vacated, the administrative law judge should reconsider the opinions of Drs. Kahn, Zaldivar, and Rosenberg on the issue of disability causation. Employer has not filed a response to claimant's cross-appeal. The Director, Office of Workers' Compensation Programs, has not filed a response brief in either appeal.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] 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 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); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least thirty years of qualifying coal mine employment; the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b); and invocation of 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). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] 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*

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 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). After finding that employer failed to disprove the existence of clinical pneumoconiosis, the administrative law judge reviewed the pathology[5] and medical opinion evidence relevant to whether employer disproved the existence of legal pneumoconiosis. The administrative law judge discredited the opinions of Drs. Oesterling,[6] Kahn,[7] Zaldivar,[8] and Rosenberg[9] that claimant does not have legal

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v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 7.

[4] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconiosis, *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. This 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." 20 C.F.R. §718.201(a)(1). "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).

[5] On September 18, 2006, claimant underwent a right middle lung lobectomy with wedge biopsy by Dr. Figueroa, from which a pathology report was prepared by Dr. Mangano. Dr. Mangano diagnosed squamous cell carcinoma, emphysema, and fibrous nodules in the lung containing black pigment. Employer's Exhibits 5, 6.

[6] Dr. Oesterling reviewed pathology slides from claimant's wedge biopsy and prepared a report dated October 12, 2015. He observed minimal evidence of macular interstitial clinical pneumoconiosis, respiratory bronchiolitis, centrilobular emphysema, and squamous cell carcinoma. However, he concluded that claimant's respiratory symptomatology is due to smoking, not coal dust inhalation. Employer's Exhibit 3.

pneumoconiosis[10] and found that employer did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i)(A). Decision and Order at 29-33; Claimant's Exhibits 2, 3; Employer's Exhibits 1, 2, 3, 4.

Employer argues that the administrative law judge erred in discrediting Dr. Oesterling's opinion relevant to the existence of legal pneumoconiosis.[11] Employer's

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[7] Dr. Kahn reviewed microscopic slides and Dr. Oesterling's report. He prepared reports dated December 20, 2015 and January 13, 2016. Dr. Kahn diagnosed clinical pneumoconiosis and opined that claimant's chronic bronchitis and centrilobular emphysema are due to tobacco smoke. Claimant's Exhibits 2, 3.

[8] Dr. Zaldivar examined claimant on June 11, 2014 and prepared reports dated July 15, 2014 and December 14, 2015. After reviewing the pathology reports and treatment records, Dr. Zaldivar diagnosed lung cancer, clinical pneumoconiosis, and centrilobular emphysema due to smoking. He opined that claimant's severe pulmonary impairment is not related to his occupation, but is due to his emphysema from cigarette smoking. Employer's Exhibits 1, 2.

[9] Dr. Rosenberg prepared a records review dated March 3, 2016. Dr. Rosenberg diagnosed clinical pneumoconiosis, chronic obstructive pulmonary disease with related emphysema, lung cancer, and coronary artery disease. Dr. Rosenberg opined that claimant's obstruction is due entirely to cigarette smoking. Employer's Exhibit 4.

[10] The administrative law judge also considered the opinions of Drs. Rasmussen, Sood, and Cohen, who diagnosed legal pneumoconiosis. Decision and Order at 8-11, 26; Director's Exhibit 10; Claimant's Exhibits 1, 4. As these opinions do not assist employer in establishing rebuttal of the Section 411(c)(4) presumption, the administrative law judge was not required to weigh them on the issue of legal pneumoconiosis. *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015).

[11] We affirm the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis, as it is unchallenged on appeal. *Skrack*, 6 BLR at 1-711; Decision and Order at 2 n.2, 28; Hearing Transcript at 6. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 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). Nevertheless, because legal pneumoconiosis is relevant to the second method of rebuttal, we will address employer's contention that the

Brief at 13-19. As summarized by the administrative law judge, Dr. Oesterling provided a detailed description of each photomicrograph he reviewed and noted that "[t]he changes due to coal dust are quite small with small interstitial macules of coalworkers' pneumoconiosis" while the tissue damage due to cigarette smoke exposure was more abundant.[12] Decision and Order at 27; Employer's Exhibit 3 at 4. Based on his observations, Dr. Oesterling concluded that "[a]ny respiratory symptomology which [claimant] experiences is due to his personal [smoking] habit, not due to coal dust inhalation." Employer's Exhibit 3 at 4.

The administrative law judge found that in light of Dr. Oesterling's acknowledgement that claimant's lungs exhibited changes due to coal dust, Dr. Oesterling's opinion that smoking was the sole etiology for claimant's emphysema and associated impairment was conclusory and "largely unexplained." Decision and Order at 27; Employer's Brief at 13-19. Specifically, the administrative law judge correctly noted the Department of Labor's position that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms, and that legal pneumoconiosis is independent of clinical pneumoconiosis. Decision and Order at 27-28; *see* 20 C.F.R. §718.201(a)(1), (2); 65 Fed. Reg. at 79,920, 79,943 (Dec. 20, 2000). Contrary to employer's contention, in light of these factors the administrative law judge permissibly

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administrative law judge erred in weighing the medical opinion evidence relevant to the existence of legal pneumoconiosis. Employer's Brief at 17. Indeed, the administrative law judge discredited Dr. Oesterling's opinion on the cause of claimant's impairment, in part, because he failed to diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. Decision and Order at 34-35.

[12] Dr. Oesterling stated that the slides he reviewed revealed major lesions in claimant's middle lobe consisting primarily of a poorly differentiated squamous cell lesion. He added that:

> [The slides] also demonstrate the presence of a mild centrilobular pulmonary emphysema. Throughout these sections we see the nests of smokers' macrophages which accounts for both his bronchogenic lesion and for the modest emphysema present. The changes due to coal dust are quite small with small interstitial macules of coalworkers' pneumoconiosis noted, this constituting the lowest level of simple coalworkers' pneumoconiosis.

Employer's Exhibit 3 at 4.

concluded that Dr. Oesterling failed to persuasively explain how he eliminated claimant's thirty years of coal mine dust exposure as a contributing cause, along with his cigarette smoking, of his disabling chronic obstructive pulmonary disease/emphysema.[13] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 312-14, 25 BLR 2-115, 2-125-29 (4th Cir. 2012); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 27-28; Employer's Brief at 13-16. The administrative law judge's determination that Dr. Oesterling's opinion was too conclusory to carry employer's burden was well within his discretion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). We therefore affirm, as supported by substantial evidence, the administrative law judge's determination that Dr. Oesterling's opinion does not disprove the existence of legal pneumoconiosis.[14] *See Compton v.*

[13] Without providing any further explanation, other than a blanket reference to his "observations" contained earlier in his report, Dr. Oesterling offered the following conclusions:

> There is minimal evidence of macular interstitial coalworkers' pneumoconiosis, the lowest level of simple coalworkers' pneumoconiosis.
>
> The structural damage due to coal dust is miniscule, thus it would produce no functional abnormalities.
>
> Without functional change there would be no pulmonary disability based on his coalworkers' disease.
>
> There is evidence of poorly differentiated squamous cell carcinoma involving his middle lobe which is accompanied in areas by smokers' macrophages.
>
> The moderate centrilobular emphysema present also shows obvious evidence of smokers' macrophages with an interstitial fibrosis secondary to his respiratory bronchiolitis.
>
> Any respiratory symptomology which [claimant] experiences is due to his personal [smoking] habit, not due to coal dust inhalation.

Employer's Exhibit 3 at 5.

[14] We affirm, as unchallenged on appeal, the administrative law judge's findings that the opinions of Drs. Kahn, Zaldivar, and Rosenberg were not credible to disprove the

Island Creek Coal Co., 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); Decision and Order at 27-28.

As employer raises no further challenge to the administrative law judge's weighing of the medical opinions relevant to the existence of legal pneumoconiosis, we affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption by establishing that claimant does not have legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next addressed whether employer established rebuttal by proving 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); Decision and Order at 32-35. The administrative law judge rationally discounted the opinions of Drs. Oesterling, Kahn, Zaldivar, and Rosenberg that claimant's totally disabling respiratory impairment was not caused by pneumoconiosis, in part, because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the presence of the disease.[15] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *see also Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 33. As these are the only opinions supportive of employer's burden, we affirm the administrative law judge's determination that employer failed to prove that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(ii).

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existence of legal pneumoconiosis. Decision and Order at 26-27; *Skrack*, 6 BLR at 1-711.

[15] Because the administrative law judge provided a valid basis for discrediting Dr. Oesterling's opinion, *see Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983), any error by the administrative law judge in also discounting Dr. Oestering's opinion because he did not diagnose total disability or have a complete understanding of the exertional requirements of claimant's usual coal mine work, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.[16]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[16] In view of our affirmance of the administrative law judge's award of benefits, we need not address claimant's argument, on cross-appeal, that the administrative law judge erred in his consideration of the opinions of Drs. Kahn, Zaldivar, and Rosenberg on the issue of disability causation.