U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0521 BLA

ROBERT L. CORN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ZIELINKSKI CONSTRUCTION CORPORATION	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 06/27/2018
	)	
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 Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for claimant.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for employer/carrier.

Emily Goldberg-Kraft (Kate S. O'Scannlain, Solicitor of Labor; Maia S. 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), 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/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05870) of Administrative Law Judge Colleen A. Geraghty 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 October 20, 2014.[1]

The administrative law judge credited claimant with forty-two years of coal mine employment, as stipulated by the parties, and found that claimant's surface coal mine employment was in conditions substantially similar to those in an underground mine. The administrative law judge further found that the new evidence established 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 pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge

[1] Claimant's first claim, filed on January 10, 2000, was denied by the district director because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant did not further pursue this 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 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.

additionally found that employer did not rebut the presumption and awarded benefits accordingly.[3]

On appeal, employer contends that the administrative law judge applied an incorrect legal standard in considering whether employer rebutted the Section 411(c)(4) presumption by establishing that claimant does not have legal pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging the Board to reject employer's argument that the administrative law judge utilized an incorrect legal standard in analyzing the rebuttal evidence.[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 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 establish that claimant has neither legal nor clinical pneumoconiosis,[6] or by

[3] The administrative law judge also found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Decision and Order at 38.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established forty-two years of qualifying coal mine employment, a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-11, 25-28.

[5] The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[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). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial

establishing that "no part of [claimant'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 disproved the existence of clinical pneumoconiosis, the administrative law judge addressed whether employer disproved the existence of legal pneumoconiosis. The administrative law judge rejected the opinions of Drs. Tuteur[7] and Selby[8] that claimant does not have legal pneumoconiosis 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 34-36.

Employer argues that the administrative law judge applied an incorrect standard by requiring employer's medical experts to "rule out" or "exclude" coal mine dust exposure as a cause of claimant's respiratory impairment in order to disprove the existence of legal pneumoconiosis. Employer's Brief (unpaginated) at [7-8], *quoting* Decision and Order at 34, 35.

Contrary to employer's assertion, the administrative law judge recognized that to rebut the presumed existence of legal pneumoconiosis, employer must establish the absence of any lung disease or respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 32; *see* 20 C.F.R. §§718.201(b), 718.305(d)(1)(i)(A). Moreover, as the Director asserts, the administrative law judge did not find that the opinions of Drs. Tuteur and Selby were insufficient to disprove the existence of legal pneumoconiosis on the grounds that they failed to rule out coal dust exposure as a causative factor for claimant's respiratory impairment. Decision and Order at 34-36; Director's Brief at 2. Rather, the administrative law judge found that their opinions were not credible, taking into consideration the rationale each doctor provided for why claimant did not have legal pneumoconiosis. Decision and Order at 34-36.

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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).

[7] Dr. Tuteur opined that claimant suffers from disabling chronic obstructive pulmonary disease due to cigarette smoking and aggravated by gastroesophageal reflux disease-associated bronchiectasis. Employer's Exhibits 1 at 1-5, 1-7, 3, 8, 10.

[8] Dr. Selby opined that claimant suffers from a severe obstructive impairment and non-focal emphysema entirely due to asthma and cigarette smoking. Employer's Exhibit 6 at 6-6, 6-7, 6-12. He further diagnosed bronchiectasis and stated that it is unrelated to coal mine dust exposure. Employer's Exhibit 6 at 6-7.

Specifically, the administrative law judge noted that based on medical literature and statistics, Dr. Tuteur stated that smokers who never mined have a 20% risk of developing chronic obstructive pulmonary disease while, by comparison, the risk is only 1% to 2% among nonsmoking miners. Decision and Order at 34; Employer's Exhibit 1 at 16. Therefore, Dr. Tuteur stated that based on claimant's "42 year smoking history, it is with reasonable medical certainty[] that [claimant's] clinical picture of chronic obstructive pulmonary disease[] is uniquely due to the chronic inhalation of tobacco smoke, not coal mine dust." *Id.* The administrative law judge permissibly discredited Dr. Tuteur's opinion because he "did not explain why the [c]laimant could not be one of the statistically rare individuals who develop obstruction as a result of coal mine dust exposure." Decision and Order at 35, *citing Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103-04 (7th Cir. 2008); *see A & E Coal Co. v. Adams*, 694 F.3d 798, 802-03, 25 BLR 2-203, 2-210-12 (6th Cir. 2012); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). The administrative law judge also permissibly discounted Dr. Tuteur's opinion because he failed to "address the additive effects of coal mine dust and cigarette smoking, statistically, or in the [c]laimant's particular situation."[9] Decision and Order at 35 n.18; *see* 65 Fed. Reg. 79,920, 79,940-43 (Dec. 20, 2000); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *see also Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 828-29 (10th Cir. 2017).

The administrative law judge also considered Dr. Selby's opinion that claimant has emphysema that is "non-focal and not due to coal worker's pneumoconiosis," but is instead "due to many years of heavy tobacco smoke inhalation." Employer's Exhibit 6 at 6-7; *see* Decision and Order at 35-36. The administrative law judge permissibly discredited Dr. Selby's opinion, in part, because he did not explain the basis for his conclusion that

[9] We acknowledge that in evaluating Dr. Tuteur's opinion on the existence of legal pneumoconiosis the administrative law judge used the term "rule out" and stated, at one point, that employer's burden was "to exclude coal dust exposure as a factor in the [c]laimant's disabling respiratory impairment." Decision and Order at 35. As the Director asserts and as explained above, however, the administrative law judge did not find that Dr. Tuteur's opinion failed to rebut the existence of legal pneumoconiosis because it did not meet a rule-out standard. Rather, the administrative law judge found that Dr. Tuteur's opinion is not credible. Decision and Order at 34-45. Thus, error, if any, in the administrative law judge's recitation of the legal standard for rebuttal is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Consequently, we reject employer's assertion that the case must be remanded for consideration under the proper rebuttal standard. *See Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting).

claimant's "non-focal" emphysema is due solely to his years of smoking[10] or address whether claimant's significant history of coal mine dust exposure could have also contributed to his "non-focal" emphysema. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); Decision and Order at 35-36. The administrative law judge further found that to the extent that Dr. Selby was suggesting that emphysema due to coal mine dust exposure must manifest as focal emphysema, that view is inconsistent with the Department of Labor's position, set forth in the preamble to the 2001 regulatory revisions which identifies centrilobular emphysema and centriacinar emphysema as additional types of emphysema that may be caused by coal mine dust exposure. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; Decision and Order at 35-36, *referencing* 65 Fed. Reg. at 79,939, 79,941-79,942 (Dec. 20, 2000).

Because the administrative law judge permissibly discredited the opinions of Drs. Tuteur and Selby, we affirm the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis, and thus failed to rebut the Section 411(c)(4) presumption by proving that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); Decision and Order at 36.

The administrative law judge next considered whether employer rebutted the Section 411(c)(4) presumption 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 rationally discredited the opinions of Drs. Tuteur and Selby that claimant's disability is unrelated to pneumoconiosis because neither doctor diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013). Therefore, 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)(1)(ii).

[10] Dr. Selby did not state what type of emphysema claimant has beyond describing it as "non-focal." Employer's Exhibit 6 at 7.

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