U.S. Department of Labor

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

BRB No. 16-0265 BLA

ISAAC MCQUINN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARCH ON THE NORTH FORK, INCORPORATED	)	DATE ISSUED: 03/29/2017
	)	
and	)	
	)	
Self-Insured Thru ARCH COAL, INCORPORATED	)	
	)	
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 Larry A. Temin, 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.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, 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 (2011-BLA-06192) of Administrative Law Judge Larry A. Temin (the administrative law judge) rendered on a subsequent claim filed on August 23, 2010,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with sixteen years of surface coal mine employment, based on the parties' stipulation, and further found that claimant's employment was in substantially similar dust conditions to those in an underground mine. The administrative law judge also found that the new medical evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4). The administrative law judge further determined that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). Employer also contends that the administrative law judge applied incorrect standards in considering whether employer rebutted the Section 411(c)(4) presumption. Finally, employer asserts that the administrative law judge erred in weighing the medical evidence relevant to rebuttal. Claimant responds, urging

[1] Claimant filed his first application for benefits on July 15, 2004. Director's Exhibit 1. Administrative Law Judge Donald W. Mosser denied benefits because claimant failed to establish the existence of pneumoconiosis and total respiratory disability. *Id.* Claimant appealed and the Board affirmed the denial of benefits. *I.M.* [*McQuinn*] *v. Arch on the North Fork, Inc.*, BRB No. 07-0728 BLA (Apr. 22, 2008) (unpub.); Director's Exhibit 1. Claimant took no action with regard to that denial of benefits, until he filed this current subsequent claim. 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.

affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.[3] Employer filed a reply brief, reiterating its contentions.

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Change in an Applicable Condition of Entitlement

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 determined that claimant's prior claim was denied because he failed to establish any element of entitlement. Decision and Order at 2. The administrative law judge found that because the new evidence established that claimant has a totally disabling respiratory impairment, claimant established a change in an applicable condition of entitlement. Decision and Order at 18.

Employer contends that the administrative law judge misidentified the element of entitlement previously adjudicated against claimant. Employer's Brief at 7. Employer notes that while Administrative Law Judge Donald W. Mosser denied benefits in the prior claim based on claimant's failure to establish the existence of pneumoconiosis and total respiratory or pulmonary disability, *I.M.* [*McQuinn*] *v. Arch on the North Fork,*

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established more than fifteen years of qualifying coal mine employment, a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), and invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 16-20.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); December 9, 2015 Hearing Transcript at 15.

OALJ No. 2005-BLA-06194, slip op. at 8-12 (Apr. 24, 2007), on appeal, the Board affirmed Judge Mosser's denial of benefits on the ground that claimant failed to establish the existence of pneumoconiosis, but did not reach the issue of total disability. Employer's Brief at 7, *referencing I.M.* [*McQuinn*] *v. Arch on the North Fork, Inc.*, BRB No. 07-0728 BLA, slip op. at 3-5 (Apr. 22, 2008) (unpub.). Thus, employer contends, the applicable condition of entitlement previously adjudicated against claimant is the existence of pneumoconiosis. Employer's Brief at 7.

Contrary to employer's contention, because Judge Mosser fully adjudicated both the existence of pneumoconiosis and total disability in the prior claim, and found that neither was established, both issues formed a basis of the prior denial.[5] Therefore, the administrative law judge properly determined that by establishing total respiratory or pulmonary disability based on new evidence, claimant demonstrated a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(c); *Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 758-59, 25 BLR 2-221, 2-227-28 (6th Cir. 2013); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 485, 25 BLR 2-135, 2-147 (6th Cir. 2012); *White*, 23 BLR at 1-3. Thus, as we have affirmed the administrative law judge's finding that the new evidence establishes that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), we further affirm the administrative law judge's finding that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(c).[6]

Rebuttal of the Section 411(c)(4) Presumption

[5] In affirming the denial of benefits, the Board did not address, and thus did not disturb, the administrative law judge's finding that claimant did not establish total disability. *McQuinn*, BRB No. 07-0728 BLA, slip op. at 3-5.

[6] Furthermore, because the administrative law judge found that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, claimant satisfied his burden to demonstrate a change in an applicable condition of entitlement under 20 C.F.R. §725.309. *See E. Assoc. Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511-512, 25 BLR 2-743, 754-55 (4th Cir. 2015) (holding that the fifteen-year presumption may be used to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309, including the existence of pneumoconiosis); *Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 794, 795, 25 BLR 2-285, 2-292 (7th Cir. 2013) (holding that the existence of pneumoconiosis and disability causation may be established by the fifteen-year presumption for the purpose of showing a change in an applicable condition of entitlement at 20 C.F.R. §725.309).

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,[7] 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). On the issue of legal pneumoconiosis, the administrative law judge considered the new medical opinion of Dr. Jarboe.[8] Dr. Jarboe opined that claimant has a severe restrictive impairment that is "more likely due" to congestive heart failure, obesity and air trapping secondary to asthma and smoking and not coal mine dust exposure.[9] Decision and Order at 11-14, 23-26; Director's Exhibit 20; Employer's Exhibits 8, 10, 11. The administrative law judge found that Dr. Jarboe failed to adequately explain his conclusions for why claimant does not have legal pneumoconiosis. Decision and Order at 23-26. Therefore, the administrative law judge found that employer failed to rebut the presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).

[7] 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 coal dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[8] The administrative law judge also considered the new opinions of Drs. Alam, Burnette, and Abadilla that claimant suffers from legal pneumoconiosis, and correctly found that they do not assist employer in establishing rebuttal. Decision and Order at 26; Director's Exhibit 9; Claimant's Exhibits 9-11; Employer's Exhibit 3, 6. Additionally, the administrative law judge considered the medical reports submitted with the prior claim but, due to their age, permissibly gave them little weight. *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc) (more recent medical evidence may be accorded greater probative value than that submitted with a prior claim because of the progressive nature of pneumoconiosis); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc); Decision and Order at 23.

[9] Based on his examination of claimant and his subsequent review of additional medical evidence, Dr. Jarboe diagnosed chronic bronchitis, allergic rhinitis, possible bronchial asthma, chronic congestive heart failure, hypertension, obesity, and a history of deep vein thrombosis. Director's Exhibit 20; Employer's Exhibits 8, 10, 11.

Employer asserts that the administrative law judge erred in requiring employer to "rule out" any contribution from coal mine dust as a cause of claimant's impairment in order to disprove the existence of legal pneumoconiosis. Employer's Reply Brief at 6. Employer contends that the case should be remanded for the administrative law judge to properly consider whether employer has established that claimant's impairment is not significantly related to, or substantially aggravated by, coal mine dust exposure. *Id.*, *citing* 20 C.F.R. §718.201(b).

Contrary to employer's assertion, the administrative law judge correctly stated that in order to rebut the presumed existence of legal pneumoconiosis, employer must show that claimant does not suffer from "a chronic lung disease or impairment significantly related to, or substantially aggravated by, dust exposure . . . ." Decision and Order at 20-21; *see* 20 C.F.R. §§718.201(b), 718.305(d)(1)(i). Further, the administrative law judge did not find Dr. Jarboe's opinion to be insufficient to disprove the existence of legal pneumoconiosis on the ground that he failed to rule out coal dust exposure as a causative factor for claimant's respiratory impairment. Decision and Order at 23-26. Rather, he found that Dr. Jarboe's opinion on the existence of legal pneumoconiosis is not credible, taking into consideration the rationale he provided for why claimant does not have the disease. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 23-26. Thus, we reject employer's argument that the administrative law judge applied an improper rebuttal standard.

We also reject employer's argument that the administrative law judge erred in discrediting Dr. Jarboe's opinion. Employer's Brief at 15-20. The administrative law judge observed correctly that Dr. Jarboe opined that claimant's severe restrictive impairment is not due to coal mine dust exposure, in part, because there was no evidence of a fibrotic reaction to coal dust in the lung parenchyma.[10] Decision and Order at 25; Employer's Exhibits 10 at 6, 11 at 5. The administrative law judge rationally found that

[10] Dr. Jarboe specifically stated:

> It is my opinion that the inhalation of coal mine dust has not caused the severe restrictive disease measured in the claimant. Were his severe restriction due to coal mine dust, there would be evidence of a fibrotic reaction to coal dust in the lung parenchyma.

Employer's Exhibit 11 at 5; *see also* Employer's Exhibit 10 at 6 (Dr. Jarboe stated, "were this severe restriction due to coal mine dust, there would be evidence of coal-worker's pneumoconiosis on the plain chest radiograph.").

Dr. Jarboe's opinion is inconsistent with the preamble to the revised regulations, which recognizes that "[d]ecrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not [clinical] pneumoconiosis is also present." Decision and Order at 25, *citing* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see* 20 C.F.R. §718.202(a)(4); *Banks*, 690 F.3d at 487-88, 25 BLR at 2-150-51; *A & E Coal Co. v. Adams*, 694 F.3d 798, 801, 25 BLR 2-203, 2-209-10 (6th Cir. 2012).

Employer also asserts that the administrative law judge selectively considered Dr. Jarboe's opinion. Employer's Brief at 17-19. Contrary to employer's contention, the administrative law judge recognized that Dr. Jarboe provided additional reasons in support of his conclusion that coal mine dust exposure did not contribute to claimant's restrictive impairment. Decision and Order at 11-14, 24-26; Employer's Brief at 17-19. However, the administrative law judge permissibly discounted Dr. Jarboe's opinion for the aforementioned reason. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-451 (6th Cir. 2013); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

Additionally, as summarized by the administrative law judge, Dr. Jarboe attributed claimant's chronic bronchitis entirely to smoking and not to coal mine dust exposure for the sole reason that claimant had not been exposed to coal mine dust for more than twenty years. Decision and Order at 13, 24; Employer's Exhibit 8. The administrative law judge permissibly found that this reasoning is inconsistent with the regulations, which recognize that pneumoconiosis may be latent and progressive, and "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 739, 25 BLR 2-675, 2-685-86 (6th Cir. 2014); Decision and Order 24.

We further reject employer's contention that the administrative law judge's "cursory disregard" of the prior claim evidence and the treatment records documenting claimant's history of cardiac illness, obesity, and smoking, led the administrative law judge to erroneously discredit Dr. Jarboe's opinion that claimant's respiratory impairment is due to these other factors. Employer's Brief at 15-17. Contrary to employer's argument, the administrative law judge permissibly accorded little weight to the prior claim evidence because it is older and, thus, less probative of the miner's current condition. *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc) (McGranery, J., concurring and dissenting); Decision and Order at 26. Further, the administrative law judge fully acknowledged that the treatment records document claimant's history of cardiac issues, and he summarized all of the conditions for which

claimant had been treated.[11] Decision and Order at 8-9. Moreover, the administrative law judge did not discredit Dr. Jarboe's opinion on the grounds that his attribution of claimant's impairment to heart disease, obesity, and smoking was not supported by evidence of these conditions in the record. Rather, the administrative law judge permissibly found that Dr. Jarboe did not adequately explain why claimant's more than sixteen years of coal mine dust exposure did not significantly contribute, along with claimant's other conditions, to claimant's severe restrictive impairment. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 26. As the administrative law judge's bases for discrediting the opinion of Dr. Jarboe are rational and supported by substantial evidence, this finding is affirmed.[12] *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

Because the administrative law judge permissibly found the medical opinion of Dr. Jarboe, the only opinion supportive of employer's burden, "insufficiently persuasive to rebut the presumption of legal pneumoconiosis," Decision and Order at 26, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis. Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis.[13] *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473,

[11] The administrative law judge considered the treatment records submitted with the prior and current claims. Decision and Order at 8. The administrative law judge correctly noted that in addition to documenting claimant's history of cardiac disease, the treatment records document a history of "black lung" disease and pneumoconiosis. Decision and Order at 8-9; Claimant's Exhibits 6-8. Further, Dr. Burnette, claimant's treating physician, stated that claimant suffered from end stage chronic obstructive pulmonary disease/pneumoconiosis, which directly contributed to and worsened his congestive heart failure. Decision and Order at 8; Claimant's Exhibit 9. Thus, there is no merit to employer's contention that the treatment records "do not suggest a coal mine employment related condition and support an inference that no such condition exists." Employer's Brief at 16.

[12] Because the administrative law judge provided valid bases for according less weight to the opinion of Dr. Jarboe, we need not address employer's remaining arguments regarding the weight accorded to his opinion. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[13] Consequently, we need not address employer's arguments regarding the administrative law judge's weighing of the evidence on the issue of clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

480, 25 BLR 2-1, 2-9 (6th Cir. 2011). Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *Id*.

Employer next argues that the administrative law judge erred in finding that employer did not rebut the presumed fact of disability causation. Initially, we reject employer's assertion that the administrative law judge applied an incorrect rebuttal standard. Employer's Brief at 16. The administrative law judge properly stated that employer's burden to establish that "no part of [claimant's] respiratory or pulmonary disability was caused by pneumoconiosis," equates to a requirement that employer "rule[] out" any causal relationship between claimant's pneumoconiosis and his disability. 20 C.F.R. §718.305; *see Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-155 (2015) (Boggs, J., concurring and dissenting); Decision and Order at 27. Further, the administrative law judge rationally discounted the opinion of Dr. Jarboe that claimant's pulmonary impairment was not caused by pneumoconiosis because Dr. Jarboe did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove that claimant has the disease. *See Ogle*, 737 F.3d at 1074, 25 BLR at 2-452; *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 27-28. Therefore, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4).

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