U.S. Department of Labor

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

BRB No. 16-0282 BLA

PATRICK A. CONLEY Claimant-Respondent v. GUEST MOUNTAIN MINING CORPORATION and AMERICAN INTERNATIONAL SOUTH Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/06/2017 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Matthew Moynihan (Penn, Stuart & Eskridge), Bristol, Virginia, 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 (2012-BLA-06099) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a claim filed pursuant to 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 December 17, 2010.

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[1] the administrative law judge credited claimant with at least twenty-nine years of underground coal mine employment,[2] as stipulated by the parties and supported by the record, and found that the 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 at Section 411(c)(4). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption.[3] Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, did not file a brief.

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] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the miner worked at least fifteen years in underground coal mine employment, or in coal mine employment in conditions substantially similar to those in an underground mine, and where a totally disabling respiratory or pulmonary impairment is established. 30 U.S.C. §921(c)(4).

[2] The record reflects that claimant's last coal mine employment was in Virginia. Director's Exhibit 3; Hearing Tr. at 31-32. 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 (1989) (en banc).

[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, 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 §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.

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

Employer argues that the administrative law judge failed to make a clear finding with respect to whether employer disproved the existence of legal pneumoconiosis. Employer's Brief at 8-9. We disagree. As employer notes, after determining that employer failed to disprove the existence of clinical pneumoconiosis, the administrative law judge stated that he "need not address" the issue of legal pneumoconiosis because employer could not establish that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 17. Nevertheless, as employer acknowledges, the administrative law judge proceeded to evaluate the relevant evidence and render a specific finding that employer failed to meet its burden to disprove the existence of legal pneumoconiosis.[4] Decision and Order at 17-18. Thus, contrary to employer's contention, despite the administrative law judge's statement that he "need not address" the issue of legal pneumoconiosis, it is clear that he evaluated the evidence on this issue and made a finding regarding whether employer rebutted the existence of legal pneumoconiosis. *Id*. at 17-19.

Specifically, the administrative law judge considered the opinions of Drs. Fino and Rosenberg that claimant's disabling obstructive impairment is due solely to the combined effects of obesity and cigarette smoke and is not due to coal dust exposure.[5] The administrative law judge permissibly questioned the opinions of Drs. Fino and Rosenberg

[4] The administrative law judge combined his discussion of legal pneumoconiosis with his discussion of whether employer had established, pursuant to 20 C.F.R. §718.305(d)(1)(ii), that pneumoconiosis played no part in claimant's totally disabling respiratory impairment. Decision and Order at 17-19. However, he separately concluded that employer failed to establish that claimant "does not suffer from legal pneumoconiosis" and that "pneumoconiosis was not at least a partial cause of [claimant's] respiratory or pulmonary disability." *Id.* at 19.

[5] Dr. Fino opined that claimant's cardiac disease may also contribute to his impairment. Employer's Exhibit 1.

because he found that, in attributing claimant's disabling impairment to other causes, the physicians failed to adequately explain why claimant's more than twenty-nine years of coal dust exposure were not also a contributing or aggravating factor. Decision and Order at 18-19. Because the regulatory definition of legal pneumoconiosis encompasses respiratory and pulmonary impairments "significantly related to, or substantially aggravated by, dust exposure in coal mine employment," 20 C.F.R. §718.201(b), it was proper for the administrative law judge to determine whether the doctors adequately addressed whether coal dust had aggravated claimant's respiratory or pulmonary impairment. The administrative law judge, therefore, permissibly discredited the opinions of Drs. Fino and Rosenberg. *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order at 18-19.

We further reject employer's contention that the administrative law judge's failure to make a definitive finding regarding the length of claimant's smoking history led him to erroneously discredit the opinions of Drs. Fino and Rosenberg "based upon their attribution of [claimant's disabling impairment] to smoking." Employer's Brief at 9. Although the administrative law judge did not set forth a specific finding as to the number of years that claimant smoked, the administrative law judge acknowledged that there is "no question" that claimant has a "significant smoking history and that he continues to smoke." Decision and Order at 19. The administrative law judge further acknowledged that claimant may have been "less than candid" in reporting the extent of his smoking history to the examining physicians. *Id.* The administrative law judge explained, however, that under the facts of this case, whether the physicians were aware of the exact length of claimant's smoking history is a "red herring," stating:

> Even assuming that [claimant] has a fifty pack year smoking history, as posited by Dr. Rosenberg, he also has a significant history of coal mine dust exposure, at least [twenty-nine] years of working underground, most of that time at the face. Whether [claimant] misrepresented his smoking history, intentionally or otherwise, does not change that.
>
> While [claimant's] obesity, his smoking history, and his heart condition may be factors, even the primary factors, in his respiratory disability, that does not mean that this respiratory disability was not also influenced by [claimant's twenty-nine] year history of working in underground mines. Neither Dr. Rosenberg nor Dr. Fino has adequately explained how he was able to conclusively rule out this significant exposure history as a factor in Mr. Conley's total respiratory disability.

Decision and Order at 19. As set forth above, contrary to employer's argument, the administrative law judge did not discredit the opinions of Drs. Fino and Rosenberg because they opined that claimant's disabling impairment is "partially caused by smoking." Employer's Brief at 9. Rather, the administrative law judge discredited their opinions because neither physician adequately explained why coal dust did not also contribute to, or aggravate, claimant's impairment. Decision and Order at 19. Thus, employer has not shown how the administrative law judge's failure to make a specific smoking history finding undermined the validity of his credibility determinations. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984); Decision and Order at 19. Because the administrative law judge permissibly discredited the opinions of Drs. Fino and Rosenberg, we affirm the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis. 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.[6] *See* 20 C.F.R. §718.305(d)(1)(i).

Employer next argues that the administrative law judge erred in finding that employer did not rebut the presumed fact of disability causation by showing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 CFR §718.305(d)(1)(i), (ii); Employer's Brief at 8. We disagree. The administrative law judge rationally discounted the opinions of Drs. Fino and Rosenberg that claimant's disabling impairment was not caused by pneumoconiosis because Drs. Fino and Rosenberg failed to diagnose legal pneumoconiosis, which is contrary to the administrative law judge's own finding that employer failed to disprove the existence of the disease. *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505, 25 BLR 2-713, 2-721 (4th Cir. 2015); *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 19. Therefore, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by proving that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(ii).

[6] 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 contentions of error 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).

Because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge's award of benefits is affirmed.

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