U.S. Department of Labor

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

BRB No. 17-0301 BLA

GEORGE W. PHILLIPS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GUEST MOUNTAIN MINING CORPORATION	)	
	)	
and	)	
	)	
CHARTIS CASUALTY COMPANY/AIG	)	DATE ISSUED: 03/14/2018
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Matthew Moynihan (Penn, Stuart & Eskridge), Bristol Virginia/Tennessee, 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 (2015-BLA-5002) of Administrative Law Judge Drew A. Swank 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 September 17, 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 fifteen years of qualifying coal mine employment, as stipulated by the parties. He also accepted employer's concession that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[2] Thus, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4). He further found that employer failed to rebut the presumption and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in evaluating the smoking history evidence, and weighing the medical opinion evidence relevant to rebuttal.[3] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.[4]

[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 impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[2] The administrative law judge noted that employer withdrew its controversion of the issue of total disability in its post-hearing brief. Decision and Order at 7.

[3] Eleven months after filing its brief in support of the petition for review, and five months after the briefing schedule closed, employer moved to hold this case in abeyance pending a decision from the United States Supreme Court in *Lucia v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), *aff'd on reh'g*, 868 F.3d 1021 (Mem.) (2017), *cert. granted*, U.S. , 2018 WL 386565 (Jan. 12, 2018). In its motion, employer argues for the first time that the manner in which Department of Labor administrative law judges are appointed may

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Smoking History

Employer argues that the administrative law judge erred in finding that claimant has a smoking history of "at least 42 pack-years." Employers Brief at 5, *quoting* Decision and Order at 5. Employer asserts that the administrative law judge failed to consider claimant's treatment records which indicate a more extensive smoking history of 1.5 to 2 packs per day for 42 to 44 years, for a smoking history of at least 66 pack-years. Employer's Brief at 5-6. Employer's argument lacks merit.

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violate the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer's Motion at 2-4. Because the Supreme Court will address in *Lucia* whether Securities and Exchange Commission administrative law judges are "inferior officers" within the meaning of the Appointments Clause, employer requests that this case be held in abeyance until the Court resolves that issue. *Id.* The Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal. *See Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982). And while the Board retains the discretion in exceptional cases to consider nonjurisdictional constitutional claims that were not timely raised, *Freytag v. Comm'r*, 501 U.S. 868, 879 (1991), employer has not attempted to show why this case so qualifies. Because employer did not raise the Appointments Clause issue in its opening brief, it waived the issue. Therefore, employer's motion to hold this case in abeyance is denied.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment and total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-4, 7. Thus, we affirm the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption. *See Skrack*, 6 BLR at 1-711; Decision and Order at 7.

[5] 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 5; Decision and Order at 6.

The length and extent of claimant's smoking history is a factual determination for the administrative law judge. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). The administrative law judge noted that claimant consistently reported to the examining physicians that he smoked about a pack per day from around 1970 until 2012 or 2013, a period of 42 to 43 years. Decision and Order at 5. Contrary to employer's assertion, however, the administrative law judge also noted that claimant's treatment records indicate that he may have smoked as much as "a pack and [a] half or even two packs per day."[6] *Id.*, *citing* Employer's Exhibits 6, 7. Taking into consideration the complete range of claimant's reported smoking histories, the administrative law judge permissibly concluded that claimant has a "very significant smoking history" of "*at least*" 42 pack-years. Decision and Order at 5 (emphasis added); *see Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989). Additionally, as both Drs. Fino and McSharry relied on a smoking history commensurate with that found by the administrative law judge, employer has not shown how the administrative law judge's reliance on a smoking history of at least forty-two pack-years, rather than sixty-six pack-years, affected his evaluation of their opinions.[7] *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). We therefore affirm the administrative law judge's finding that claimant has a smoking history of at least forty-two pack-years.

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

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

[6] The administrative law judge considered all of the treatment records highlighted by employer, except those from Dr. Breeding, which were excluded from the record. Decision and Order at 5, 19; Employer's Brief at 5; Claimant's Exhibit 4. As employer noted, however, Dr. Breeding recorded a smoking history of one and one-half packs per day for over forty years, similar to that recorded in claimant's other treatment records. *See* Employer's Brief at 5; Claimant's Exhibit 4.

[7] In opining that claimant's chronic obstructive pulmonary disease (COPD) is related solely to smoking, Dr. Fino relied on a smoking history of forty-two pack-years, and Dr. McSharry relied on a smoking history of up to forty-four pack-years. Decision and Order at 15, 16; Employer's Exhibits 1, 11.

clinical pneumoconiosis,[8] 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).

The administrative law judge found that employer disproved the existence of clinical pneumoconiosis, but did not disprove the existence of legal pneumoconiosis. He discredited as inadequately explained the opinions of Drs. Fino and McSharry that claimant does not have legal pneumoconiosis but suffers from disabling chronic obstructive pulmonary disease (COPD)/emphysema related solely to smoking.[9] Decision and Order at 15-17; Director's Exhibit 11; Employer's Exhibit 1.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Fino and McSharry. We disagree. Dr. Fino opined that only a small percentage of miners develop clinically significant reductions in their FEV1 and FEV1/FVC ratio, and that reductions attributable to coal dust exposure correlate with miners who have been exposed to a high dust burden that is radiographically apparent.[10]

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

[9] The administrative law judge also considered the opinions of Drs. Johnson and Green that claimant suffers from legal pneumoconiosis in the form of COPD/emphysema due to a combination of smoking and coal dust. Decision and Order at 14-16. The administrative law judge correctly noted that employer bears the burden of proof on rebuttal, and the opinions of Drs. Johnson and Green do not aid employer in satisfying its burden. *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 138-43 (4th Cir. 2015); Decision and Order at 19.

[10] Dr. Fino discussed studies concluding that miners who have significant losses of FEV1, FVC, and FEV1/FVC are those who have been exposed to a high dust burden and high cumulative exposure, and correlating the severity of emphysema with the amount of dust seen in the lungs. Director's Exhibit 11 at 12, 14-15. Dr. Fino stated that by utilizing the results of a chest x-ray, a physician may be able to quantitate the amount of coal mine dust contribution to a miner's overall pulmonary impairment due to

Decision and Order at 15; Director's Exhibit 11 at 12, 14-17. The administrative law judge permissibly found that, even assuming dust-related reductions occur only in a minority of miners, Dr. Fino failed to adequately explain how he "exclude[d] coal mine dust as a contributing cause of *Claimant's* obstruction." Decision and Order at 16 (emphasis added); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997). The administrative law judge further permissibly found Dr. Fino's exclusion of legal pneumoconiosis based on the absence of radiographically-apparent coal dust in claimant's lungs to be inconsistent with the regulations, which recognize that a physician can render a credible diagnosis of pneumoconiosis "notwithstanding a negative x-ray." *See* 20 C.F.R. §718.201(a)(2), 718.202(a)(4); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311-12, 25 BLR 2-115, 2-125 (4th Cir. 2012); *see also* 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000); Decision and Order at 16. Further, in light of the additive nature of smoking and coal dust exposure, the administrative law judge permissibly found that Dr. Fino failed to adequately explain why claimant's coal dust exposure did not contribute, along with smoking, to claimant's obstructive impairment. *See* 20 C.F.R. §718.201(a)(2); *Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *see also Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); Decision and Order at 16. As the administrative law judge provided valid reasons for his findings, we affirm his determination that Dr. Fino's "significantly flawed" opinion merits "diminished weight." Decision and Order at 16, 19; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-276.

We also reject employer's argument that the administrative law judge erred in his consideration of Dr. McSharry's opinion. Employer's Brief at 8-9. Dr. McSharry attributed claimant's emphysema entirely to cigarette smoking, in part because "the airflow obstruction, hyperinflation and diffuse abnormality pattern seen in this disease is rarely if ever seen among nonsmoking coal miners." Decision and Order at 16-17, *quoting* Employer's Exhibit 1. The administrative law judge permissibly discredited Dr. McSharry's opinion as based on generalities regarding the effects of smoking, as opposed to those of coal mine dust exposure.[11] *See Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-

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emphysema. Thus, Dr. Fino concluded, a chest x-ray can be used to determine whether a miner is disabled in whole or in part due to coal dust inhalation. *Id.* at 15.

[11] Dr. McSharry stated: "Emphysema is a common disease in the general population of smokers, and the airflow obstruction, hyperinflation, and diffusion abnormality pattern seen in this disease is rarely if ever seen among nonsmoking coal

5, 1-7 (1985); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 321, 25 BLR 2-255, 2-262 (4th Cir. 2013); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 17. Substantial evidence supports the administrative law judge's credibility determinations regarding the opinions of Drs. Fino and McSharry, the only opinions supportive of a finding that claimant does not have legal pneumoconiosis. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000). We therefore 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. *See* 20 C.F.R. §718.305(d)(1)(i).

Employer next argues that the administrative law judge erred in finding that it failed to establish that claimant's total disability is not due to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). We disagree. The administrative law judge rationally discounted the opinions of Drs. Fino and McSharry because neither physician diagnosed claimant with legal pneumoconiosis, and he found no "specific and persuasive reasons" for concluding that their opinions on the issue of disability causation were independent of their opinions regarding the existence of pneumoconiosis. Decision and Order at 21; *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). Moreover, employer has not raised any specific challenge to this finding. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). 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).

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miners. This emphysema is caused by smoking and not by coal dust exposure. The symptoms seen in this case are typical of individuals with smoking related emphysema." Employer's Exhibit 1 at 2.

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

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge