U.S. Department of Labor

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

BRB No. 17-0316 BLA

RONNIE W. KASHOLA Claimant-Respondent v. LADY H. COAL COMPANY, INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/19/2018 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in a Subsequent Claim of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (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.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits in a Subsequent Claim (2015-BLA-05092) of Administrative Law Judge Lystra A. Harris 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 subsequent claim filed on November 15, 2013.[1]

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] the administrative law judge credited claimant with seventeen years of underground coal mine employment, and accepted employer's concession that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[3] The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4).

[1] This is claimant's second claim. Director's Exhibit 3. Claimant's first claim, filed on January 15, 2004, was denied by the district director on January 28, 2005 because claimant did not establish total respiratory disability. Director's Exhibit 1 at 27. Claimant requested a hearing, but failed to timely respond to communications from employer or the Office of Administrative Law Judges regarding discovery matters or hearing. On April 11, 2006, the claim was dismissed pursuant to 20 C.F.R. §725.465(a)(2). Decision and Order at 2; Director's Exhibit 1 at 29-31.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a 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.

[3] The administrative law judge noted that employer withdrew its controversion of the issue of total disability at the hearing and in its post-hearing brief. Decision and Order at 6-7; Hearing Tr. at 13.

The administrative law judge also found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in weighing the medical opinion evidence in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant did not file a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's allegations of error and affirm the award of benefits.[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 into the Act 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 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,[6] or by

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established seventeen years of underground coal mine employment and the existence of a totally disabling respiratory or pulmonary impairment 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 5-7. Thus, we further affirm the administrative law judge's findings that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). *See Skrack*, 6 BLR at 1-711; Decision and Order at 6-7.

[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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibit 5.

[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 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).

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). The administrative law judge found that employer failed to rebut the presumption at Section 411(c)(4) by either method.[7]

Relevant to the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Zaldivar and Fino.[8] Dr. Zaldivar opined that claimant does not have legal pneumoconiosis, but suffers from chronic obstructive pulmonary disease (COPD)/emphysema related to cigarette smoking and longstanding asthma, and unrelated to coal mine dust exposure. Dr. Fino similarly opined that claimant does not have legal pneumoconiosis, but suffers from COPD/emphysema due entirely to cigarette smoking. The administrative law judge discredited their opinions as contrary to the regulations and inadequately explained and concluded that, therefore, employer failed to disprove the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i).

Employer argues that the administrative law judge erred in her consideration of the opinions of Drs. Zaldivar and Fino. We disagree. The administrative law judge considered Dr. Zaldivar's opinion that "[t]here is no evidence in this case to diagnose legal pneumoconiosis" because "[claimant] does not have any radiographic pneumoconiosis and clinically what he has is lifelong asthma worsened by not being treated and smoking." Employer's Exhibit 1 at 6. She noted that Dr. Zaldivar also discussed studies correlating the severity of emphysema with the amount of dust seen in the lungs, and indicating that miners with a lack of radiographic pneumoconiosis had normal pulmonary function.[9] Decision and Order at 14-15; 20-21; Employer's Exhibit 4

[7] The administrative law judge found that employer disproved the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B). Decision and Order at 22.

[8] The administrative law judge also considered the opinions of Drs. Mullins, Rasmussen, and Gaziano, that claimant suffers from legal pneumoconiosis in the form of chronic obstructive pulmonary disease COPD/emphysema due to both cigarette smoking and coal dust exposure. Decision and Order at 11-12, 17. The administrative law judge correctly noted that employer bears the burden of proof on rebuttal, and the opinions of Drs. Mullins, Rasmussen, and Gaziano do not aid employer in satisfying that burden. Decision and Order at 22.

[9] Employer acknowledges that in concluding that claimant does not have legal pneumoconiosis, Drs. Zaldivar and Fino "rely on chest x-ray evidence to demonstrate the lack of a significant dust burden in claimant's lungs," and "radiological findings" to

at 4-5. Contrary to employer's argument, the administrative law judge acknowledged Dr. Zaldivar's assertions that a negative x-ray does not rule out legal pneumoconiosis. Decision and Order at 20-21; Employer's Exhibit 4 at 4.

The administrative law judge also noted Dr. Zaldivar's statement that he relied on claimant's history of asthma and cigarette smoking, not his negative x-rays, to exclude coal mine dust exposure as a contributing factor to his respiratory impairment. *Id*. The administrative law judge permissibly determined, however, that in view of Dr. Zaldivar's "lengthy discussion of a study connecting individuals with negative x-ray studies and normal pulmonary results," Dr. Zaldivar's assertion that he believes that a negative x-ray does not rule out legal pneumoconiosis is "not persuasive." Decision and Order at 20-21. Thus, as the Director asserts, the administrative law judge permissibly discredited Dr. Zaldivar's opinion as 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); 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311-12, 25 BLR 2-115, 2-125 (4th Cir. 2012); Decision and Order at 21; Director's Brief at 3.

The administrative law judge also considered Dr. Zaldivar's explanation that coal mine dust did not contribute to claimant's impairment because "coal workers' pneumoconiosis has never been found to result in asthmatic problems." Decision and Order at 20, *quoting* Employer's Exhibit 1 at 6. The administrative law judge permissibly discredited Dr. Zaldivar's opinion that claimant's respiratory impairment is entirely due to asthma related to and exacerbated by smoking, because Dr. Zaldivar failed to explain why coal mine dust also could not have aggravated his condition. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *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, 2-274 (4th Cir. 1997); Decision and Order at 21. As it is supported by substantial evidence, we affirm the administrative law judge's determination that Dr. Zaldivar's opinion is not entitled to probative weight on the issue of legal pneumoconiosis. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); Decision and Order at 21.

We also reject employer's argument that the administrative law judge erred in giving little weight to Dr. Fino's opinion. The administrative law judge noted that Dr. Fino relied on statistical averages and medical studies indicating that only a small

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determine "the severity of the impairment attributable to coal dust exposure." Employer's Brief at 17.

percentage of miners develop clinically significant reductions in their FEV1 and FEV1/FVC ratio from coal dust exposure, while the damage from smoking is much greater than previously believed.[10] Decision and Order at 21; *see* Employer's Exhibits 2 at 9-12, 3 at 1. The administrative law judge found that even if this were true, Dr. Fino failed to adequately explain why claimant was not among a statistical minority of miners sustaining significant FEV1 losses from coal dust exposure.[11] *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-276; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 17, 21; Director's Brief at 3. Further, in light of the additive nature of smoking and coal dust exposure, the administrative law judge permissibly found that Dr. Fino's opinion "ignores any possibility" that coal mine dust could have exacerbated claimant's condition, even if it was caused initially by asthma or smoking. *See* 20 C.F.R. §718.201(a)(2); *Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *see also Owens*, 724 F.3d at 558, 25 BLR at 2-353; *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); Decision and Order at 22. As the administrative law judge's permissible findings are supported by substantial evidence, they are affirmed. *See Compton*, 211 F.3d at 207-208, 22 BLR at 2-168.

Because the administrative law judge permissibly discredited the opinions of Drs. Zaldivar and Fino, the only opinions supportive of a finding that the miner does not suffer from legal pneumoconiosis, we affirm her finding that employer failed to establish that the miner does not have legal pneumoconiosis. Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section

[10] Dr. Fino opined that "[s]tatistically speaking, about 90% of [] miners suffered an average loss of FEV1," and studies show that the "average loss of FEV1 may be statistically significant, but that loss is not a clinically significant contribution to [a] miner's loss in lung function. In other words, it usually does not participate in impairment or disability." Employer's Exhibits 2 at 9-12; 3 at 2.

[11] The administrative law judge correctly noted that Dr. Fino's conclusion that claimant's losses in FEV1 are statistically unlikely to be related to coal mine dust exposure is based, in part, on an erroneous calculation. Decision and Order at 21. Dr. Fino cited medical studies showing that only 6-8% of miners will have an above average loss of FEV1 after working thirty-five years in the mines. Employer's Exhibit 2 at 7. Dr. Fino explained that because "[claimant] only worked one-third of that amount of time" his risk of developing a significant loss of FEV1 due to coal dust was "probably only 2-3%." *Id.* As the administrative law judge correctly noted, however, claimant has seventeen years of coal mine employment, which is almost half, not one-third, of the thirty-five years cited in the study. Decision and Order at 21-22.

411(c)(4) presumption by establishing that the miner does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Finally, the administrative law judge addressed whether employer established the second method of rebuttal by showing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge rationally determined that the opinions of Drs. Zaldivar and Fino merited "no probative weight" because they did not diagnose pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the presence of pneumoconiosis.[12] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-720-21 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); Decision and Order at 22-23. Moreover, employer raises no specific challenge to this determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm the administrative law judge's finding that employer failed to establish that no part of claimant's respiratory or pulmonary total disability is caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

[12] The administrative law judge found no "specific and persuasive reasons" for concluding that the opinions of Drs. Zaldivar and Fino on the issue of disability causation were independent of their opinions regarding the existence of pneumoconiosis. *See Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 23.

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 Decision and Order Awarding Benefits in a Subsequent Claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge