U.S. Department of Labor

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

BRB No. 17-0317 BLA

ROBERT V. CHEWNING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
T & T MANAGEMENT COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 03/26/2018
	)	
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 on Remand Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Karin L. 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 on Remand Awarding Benefits (2012-BLA-5862) 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 was filed on August 29, 2011, and is before the Board for the second time. The Board previously affirmed, as unchallenged on appeal, the administrative law judge's finding 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).[1] *Chewning v. T&T Mgmt. Co*., BRB No. 15-0133 BLA, slip op. at 2 nn. 2-3 (Feb. 5, 2016) (unpub.). However, the Board vacated the award of benefits because the administrative law judge did not conduct a proper analysis as to whether employer established rebuttal of the presumption. *Id*. at 5-7. On remand, the administrative law judge again determined that the evidence was insufficient to rebut the Section 411(c)(4) presumption and awarded benefits.

In the present appeal, employer contends that the administrative law judge erred in weighing the opinion of Dr. Bellotte relevant to rebuttal. Both claimant and the Director, Office of Workers' Compensation Programs (the Director), filed response briefs urging affirmance of the award of benefits.

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,

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where 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 are established. 30 U.S.C. §921(c)(4); *see* 20 C.F.R. §718.305.

and in accordance with applicable law.[2] 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 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,[3] 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).

Having found that employer disproved the existence of clinical pneumoconiosis,[4] the administrative law judge considered Dr. Bellotte's opinion that claimant does not have legal pneumoconiosis. Decision and Order at 11, 13; Employer's Exhibit 3. Dr. Bellotte diagnosed interstitial fibrosis and asthma, and opined that both conditions are unrelated to coal dust exposure. Employer's Exhibit 3 at 8. The administrative law judge credited Dr. Bellotte's opinion that claimant's interstitial fibrosis is due to chronic aspiration into the lungs caused by a hiatal hernia and gastroesophageal reflux disease as

[2] 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, 1-202 (1989) (en banc); Director's Exhibit 4.

[3] "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).

[4] The administrative law judge noted that the CT scan interpretations showed "abnormalities," and the interpreting physician stated that he could not exclude pneumoconiosis. Decision and Order at 12. However, in concluding that employer disproved the existence of clinical pneumoconiosis, the administrative law judge credited the negative x-ray evidence, noting that the most recent negative x-ray post-dated both of the CT scans of record. *Id*. at 12-13.

reasoned and documented, but found that Dr. Bellotte's opinion was insufficient to disprove a link between claimant's asthma and coal mine dust exposure. Decision and Order at 13. Therefore, the administrative law judge found that employer failed to disprove the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i). *Id*.

Employer contends that the administrative law judge erred in discrediting Dr. Bellotte's opinion. We disagree. Contrary to employer's argument, the administrative law judge did not reject Dr. Bellotte's opinion as hostile to the Act. Rather, the administrative law judge considered Dr. Bellotte's opinion that claimant's asthma was not legal pneumoconiosis because "[a]sthma is a disease of the general population and is not caused by coal dust." Decision and Order at 11, *quoting* Employer's Exhibit 3 at 8. The administrative law judge permissibly discredited Dr. Bellotte's opinion that claimant does not have legal pneumoconiosis because "even if Dr. Bellotte is correct and coal dust exposure did not *cause* [c]laimant's asthma, he failed to explain how he concluded that the condition was not substantially aggravated by coal dust exposure."[5] Decision and Order at 13; 20 C.F.R. §§718.201(b); 718.305(d)(1)(i)(A); *see 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, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

[5] Employer additionally argues that Dr. Bellotte's explanation of claimant's disabling respiratory impairment excludes asthma, and that "Dr. Bellotte stated that the asthma accounts for many of the [c]laimant's symptoms, not impairments…." Employer's Brief at 14. However, as the Director points out, Dr. Bellotte listed asthma as one of claimant's diagnoses and stated "additional asthma medication might be beneficial" and that "[w]ithout all [of] the above listed medical problems, [claimant] would have the pulmonary capacity to do his previous coal mine job." *See* Director's Brief at 2-3, *quoting* Ex 3 at 8. Further, we observe that employer characterizes the Department's preamble reference to asthma as noting "that asthma is a subset of[,] or a more specific type of[,] COPD [chronic obstructive pulmonary disease]." Employer Brief at 13. Employer does not here contend that asthma is not a chronic pulmonary disease. Consequently, since 20 CFR §718.201 encompasses "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment," the administrative law judge permissibly considered whether coal dust exposure substantially aggravated claimant's asthma. *See* 20 C.F.R. §718.305(d)(1)(i)(A); *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 13.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999); *Anderson,* 12 BLR at 1-113. As it is supported by substantial evidence, we affirm the administrative law judge's determination that Dr. Bellotte's opinion is insufficient to disprove the existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); *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 13. Thus, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next addressed whether employer rebutted the presumed fact of disability causation by establishing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. Decision and Order at 13-15. The administrative law judge rationally discounted Dr. Bellotte's opinion that claimant's pulmonary impairment was not caused by pneumoconiosis because Dr. Bellotte did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-505, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269-70, 22 BLR 2-372, 2-382-84 (4th Cir. 2002); *Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 14-15. Moreover, as employer raises no specific challenge to this determination, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(ii).

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 on Remand Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge