U.S. Department of Labor

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

BRB No. 17-0318 BLA

LOWELL D. RAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 03/28/2018
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of William T. Barto, Administrative Law Judge, United States Department of Labor.

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

Matthew Moynihan (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2015-BLA-05677) of Administrative Law Judge William T. Barto, rendered on a subsequent claim filed on January 7, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-

944 (2012) (the Act).[1] The administrative law judge found that claimant worked for 31.36 years in underground coal mine employment, has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2),[2] and therefore is entitled to the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption.[4] Claimant responds, urging affirmance

[1] Claimant filed an initial claim for benefits on November 12, 1998, which was denied by the district director on March 19, 1999, because claimant did not establish total disability. Director's Exhibit 1.

[2] Based on his finding that claimant established total disability, the administrative law judge also determined that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. When 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 at least "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). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). In this case, because claimant's prior claim was denied for failure to establish total disability, he was required to submit new evidence establishing this element of entitlement to obtain review of his claim on the merits. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).

[3] Under Section 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or surface 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), as implemented by 20 C.F.R. §718.305(b).

[4] Approximately nine months after filing a brief in support of its petition for review, and approximately seven 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 violate the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer's Motion at 1-2. Because the Supreme Court will address in *Lucia* whether

of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.[5]

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.[6] 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).

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis,[7] or that

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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 the 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.

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 31.36 years of underground 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). Thus, we further affirm the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption, and established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). *Id.*

[6] The record reflects that claimant's last coal mine employment was in Virginia. Decision and Order at 2; Director's Exhibit 4. 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, 1-202 (1989) (en banc).

[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). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial

"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); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer failed to establish rebuttal by either method.

To establish that claimant does not have legal pneumoconiosis, employer must demonstrate that he does not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich* 25 BLR 1-149, 1-1-55 n.8. In evaluating whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Vernon, Raj, Green, McSharry, and Sargent. Decision and Order at 21-24; Director's Exhibits 11, 16; Claimant's Exhibits 3, 4; Employer's Exhibits 1, 9.

Drs. Vernon, Raj, and Green opined that claimant has legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to coal mine dust exposure, with some contribution from smoking. Director's Exhibit 11; Claimant's Exhibits 3, 4. Drs. McSharry and Sargent opined that claimant does not have legal pneumoconiosis but has a non-disabling obstructive respiratory condition caused entirely by asthma, with no contribution from coal dust exposure.[8] Director's Exhibit 16; Employer's Exhibits 1, 9. The administrative law judge found that the opinions of Drs. Vernon, Raj, and Green are "well-reasoned and documented," and supported by the record. Decision and Order at 24. He gave "less weight" to the opinions of Drs. McSharry and Sargent because they are based

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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).

[8] The administrative law judge noted that the record also contains treatment records from Drs. Sutherland and Neal, and that Dr. Sutherland "primarily treated [claimant] for his [chronic obstructive pulmonary disease (COPD)] and occasionally saw him regarding minor aches and pains in his elbow and chest." Decision and Order at 25; Employer's Exhibit 3. The administrative law judge noted that Dr. Neal treated claimant for "allergic rhinitis and asthma." Decision and Order at 25; Employer's Exhibit 2. He found that their opinions do not assist employer in disproving the existence of legal pneumoconiosis because they do not indicate the etiology of claimant's COPD or address claimant's coal mine employment history. *Id.*

on generalities and unexplained. *Id.* The administrative law judge therefore concluded that employer failed to rebut the presumption that claimant has legal pneumoconiosis.

Employer argues that the administrative law judge erred in finding that the opinions of Drs. McSharry and Sargent are insufficient to disprove legal pneumoconiosis. We reject employer's argument. The administrative law judge permissibly determined that their opinions are not adequately reasoned or documented, as Drs. McSharry and Sargent do not cite any evidence or medical literature in support of their view that the rapid progression of claimant's obstructive impairment is inconsistent with the diagnosis of a coal dust-induced lung disease. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-75-76 (4th Cir. 1997); Decision and Order at 24. Specifically, the administrative law judge found that Dr. McSharry did not provide any support for his opinion that it is "extremely uncommon" to have "significant and rapid progression of pulmonary function abnormalities in patients with coal workers' pneumoconiosis" without also having "high profusion radiographic findings." Decision and Order at 24, *citing* Employer's Exhibit 9 at 5.

Even accepting that premise as true, however, the administrative law judge further reasonably determined that the probative value of Dr. McSharry's opinion still would be diminished by his failure to explain why claimant could not represent one of the "uncommon" cases in which a rapid decline in pulmonary function is attributable to coal dust exposure. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14, 25 BLR 2-115, 2-129-30 (4th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008) (administrative law judge permissibly rejected opinion where physician did "not explain why [the miner] could not be one of [the] 'rare' cases."). With respect to Dr. Sargent, the administrative law judge similarly found his opinion to be "conclusory and generalized" because the physician "simply states that it is 'inconceivable that such a rapid [change in lung function] could be attributed to remote coal dust exposure,' without providing any medical evidence as to why it is so inconceivable." Decision and Order at 24, *quoting* Employer's Exhibit 10 at 1. In light of the valid reasons the administrative law judge provided for discrediting these opinions,[9] we affirm his finding that employer did not satisfy its burden to disprove the

[9] Because the opinions of Drs. McSharry and Sargent are the only opinions supportive of employer's burden on rebuttal, we need not address employer's arguments concerning the administrative law judge's evaluation of the diagnoses of legal pneumoconiosis made by Drs. Vernon, Raj, and Green. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

existence of legal pneumoconiosis, thereby failing to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).[10] *See Bender*, 782 F.3d at 137, 25 BLR at 2-699.

When addressing whether employer established that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis under 20 C.F.R. §718.305(d)(1)(ii), the administrative law judge permissibly accorded little weight to the opinions of Drs. McSharry and Sargent because, contrary to his own finding, they determined that claimant does not have legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (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 26. 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 pursuant to 20 C.F.R. §718.305(d)(1)(ii).

[10] As employer is required to disprove both clinical and legal pneumoconiosis, its failure to disprove legal pneumoconiosis precludes a rebuttal finding under 20 C.F.R. §718.305(d)(1)(i). Therefore, we need not address employer's arguments that it disproved that claimant has clinical pneumoconiosis. *See Johnson*, 12 BLR at 1-55; *Larioni*, 6 BLR at 1-1278.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge