U.S. Department of Labor

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

BRB No. 18-0208 BLA

RAYMOND KIGER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 03/21/2019
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 of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, for claimant.

Paul E. Sutter (Thompson, Calkins & Sutter, LLC), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2016-BLA-06036) of Administrative Law Judge Natalie A. Appetta, awarding benefits 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 claim filed on July 30, 2015.

After crediting claimant with 21.85 years of underground coal mine employment,[1] the administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). She therefore found that claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further found that employer did not rebut the presumption and awarded benefits.

On appeal**,** employer argues that the administrative law judge erred in finding it failed to rebut the Section 411(c)(4) presumption. Employer also contends the administrative law judge erred in awarding claimant augmented benefits on behalf of his daughter. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response 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).

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

Because claimant invoked the Section 411(c)(4) presumption,[3] the burden shifted to employer to establish he has neither legal nor clinical pneumoconiosis,[4] or that "no part of

[1] The record reflects that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where the evidence establishes at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] "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). The definition includes "any chronic pulmonary disease or respiratory impairment that is 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

[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 establish rebuttal by either method.

To establish that claimant does not have legal pneumoconiosis,[5] employer must demonstrate claimant 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 v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). In evaluating whether employer met its burden, the administrative law judge considered the opinions of Drs. Basheda and Rosenberg, both of whom opined that claimant does not have legal pneumoconiosis.[6] Dr. Basheda opined that claimant suffers from "tobacco-induced obstructive lung disease" with "an asthmatic component," unrelated to coal mine dust exposure. Employer's Exhibit 5 at 16; 7 at 19. Dr. Rosenberg opined that claimant suffers from smoking-related chronic obstructive pulmonary disease (COPD), unrelated to coal mine dust exposure. Employer's Exhibit 6 at 11; 9 at 14, 18-20.

The administrative law judge permissibly discredited Dr. Basheda's opinion because she found the doctor failed to adequately explain how he eliminated claimant's 21.85 years of coal mine dust exposure as a contributor to claimant's chronic obstructive lung disease. Decision and Order at 25. The administrative law judge agreed with Dr. Go that "Dr. Basheda failed to account for the possibility of both exposures contributing to [c]laimant's obstructive disease in each of his explanations of why smoking was the sole cause." Decision and Order at 18; *see Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158,

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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).

[5] The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis. Decision and Order at 23-24.

[6] The administrative law judge also considered the opinions of Drs. Celko, Go, and Sood. Decision and Order at 38-39. Dr. Celko diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due to both smoking and coal mine dust exposure. Director's Exhibit 16. Drs. Go and Sood also diagnosed legal pneumoconiosis, in the form of COPD due to both smoking and coal mine dust exposure. Claimant's Exhibits 3, 3a, 5, 5a.

163 (3d Cir. 1986) (an administrative law judge may reject as insufficiently reasoned any medical opinion that reaches a conclusion contrary to objective clinical evidence without explanation); *see also Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) (an administrative law judge permissibly accorded less weight to a physician who had not adequately explained why he believed that coal dust exposure did not exacerbate a miner's allegedly smoking-related impairments). We thus affirm the administrative law judge's discrediting of Dr. Basheda's opinion as rational and supported by substantial evidence.

The administrative law judge correctly noted Dr. Rosenberg eliminated coal mine dust exposure as a source of claimant's obstructive pulmonary disease, in part, because he found a reduction in claimant's FEV1/FVC ratio which, he maintained, was inconsistent with obstruction due to coal mine dust exposure.[7] Decision and Order at 25-26; Employer's Exhibit 6. The administrative law judge permissibly discredited his opinion because that reasoning conflicts with the medical science accepted by the DOL that coal mine dust exposure can cause clinically significant obstructive disease that can be shown by a reduction in the FEV1/FVC ratio. See 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); Decision and Order at 25-26.

Because the administrative law judge permissibly discredited the opinions of Drs. Basheda and Rosenberg,[8] we affirm her finding that employer failed to establish that claimant does not have legal pneumoconiosis, precluding a rebuttal finding that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). Further, because it is unchallenged on appeal, we affirm the administrative law judge's determination that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, and affirm the award of benefits. *See* 20 C.F.R.

[7] In attributing claimant's COPD to cigarette smoking instead of coal mine dust exposure, Dr. Rosenberg explained that while the FEV1 decreases in relationship to coal mine dust exposure, the FEV1/FVC ratio is preserved. Employer's Exhibit 6 at 5. Specific to claimant's situation, Dr. Rosenberg noted a marked reduction in the FEV1/FVC ratio. *Id.* Dr. Rosenberg opined that the extreme decline in claimant's FEV1/FVC ratio "support[s] the fact that his obstruction relates to cigarette smoking." *Id.*

[8] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Basheda and Rosenberg, any error in discrediting their opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to their opinions.

§718.305(d)(1)(ii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Benefits Augmentation

A miner s may qualify for augmented benefits on behalf of a child if the requisite standards of relationship and dependency are met. *See* 20 C.F.R. §§725.201(c), 7265.208, 725.209. A miner's unmarried child is dependent if the child has "a disability as defined in section 223(d) of the Social Security Act, 42 U.S.C. 423(d)." 20 C.F.R. §725.209(a)(2)(ii). Section 223(d) of the Social Security Act defines disability as an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. §423(d)(1)(A).

Employer asserts that the administrative law judge erred in finding that claimant established that his adult daughter satisfies the dependency requirement.[9] Employer's Brief at 15. In considering whether claimant's daughter is disabled, the administrative law judge noted that claimant submitted a copy of a January 12, 2012 Social Security Administration (SSA) award of benefits, finding that claimant's daughter has been disabled since October 23, 2009.[10] Decision and Order at 3; Director's Exhibit 8.

To support its contention that claimant's daughter is no longer disabled, employer submitted 2016 treatment records from Dr. Protsko. Dr. Protsko performed back surgery on June 8, 2016, extending claimant's daughter's spinal fusion from the L4 level to the L5 level. Employer's Exhibit 3 at 30. In a progress note dated September 2, 2016, Dr. Protsko

[9] Employer does not dispute that claimant's daughter is unmarried and satisfies the relationship requirement. Employer's Brief at 15.

[10] Specifically, Administrative Law Judge Douglas Cohen of the Social Security Administration found that claimant's daughter had "the following severe impairments: status post fusion with radiculopathy and irritable bowel syndrome." Director's Exhibit 13. Judge Cohen noted that claimant's daughter testified that, because of her back problems, "she spends 4-5 hours a day in a reclined position on even her good days." *Id.* On bad days, she testified that she stays in bed all day with a heating pad or [a transcutaneous electrical nerve stimulation] unit. *Id.* Judge Cohen further noted that, in addition to her back impairment, claimant's daughter "has irritable bowel syndrome, which has caused nausea and vomiting, diarrhea, and weight loss." *Id.* Judge Cohen further determined that, considering her age, education, work experience, and residual functional capacity, claimant's daughter could not perform any jobs existing in the national economy, and awarded benefits pursuant to Section 223(d) of the Social Security Act. *Id.*

observed that although the daughter's leg and back pain had "essentially resolved," she still had some pain on the left side, most likely related to a muscle. *Id.* at 23. Dr. Protsko further indicated that although claimant's daughter had been helping her mother at a restaurant, she reported that "full steps give her some problems." *Id.* In his most recent progress note dated December 22, 2016, Dr. Protsko recorded claimant's daughter complained of localized pain around the right SI joint. *Id.* at 26. Dr. Protsko's plan was for her to receive a right sacroiliac injection, followed by physical therapy. *Id.* at 29.

Claimant's daughter provided deposition testimony regarding her current condition on December 21, 2016. She testified that she "cannot work because of arthritis in her spine." Employer's Exhibit 4 at 21. She testified that the SSA has not changed her disability determination. *Id.* at 31. She explained that she cannot bend, twist, lift, pull, sit, or stand for long periods of time, and has not been released by any physician to do any level of work since her SSA disability determination. *Id.* at 37, 39. Based upon a review of the SSA disability award, the medical evidence, and the daughter's deposition testimony, the administrative law judge found claimant's daughter disabled within the meaning of Section 223(d) of the Social Security Act. Decision and Order at 4.

Employer contends that the administrative law judge erred because no medical evidence establishes the daughter is currently disabled. Employer's Brief at 15-18. Employer further contends the administrative law judge mistakenly accorded determinative weight to the "irrelevant" SSA award of disability benefits, rather than considering the recent medical evidence of record. *Id.* Employer's contention has no merit.

Although, as the administrative law judge found, the Social Security award does not automatically entitle claimant to augmented black lung benefits, it is highly probative of disability. *See Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 503 (4th Cir. 1999) (observing that employer "likely ha[d] no defense to augmentation on the merits" where claimant's son's receipt of Social Security disability benefits was in the record); *Scalzo v. Director*, OWCP, 6 BLR 1-1016, 1-1019-20 (1984) (holding that determination regarding disability by SSA "is highly probative evidence which, if not controlling, can be afforded great weight"); Decision and Order at 4. Moreover, the administrative law judge found that current medical records did not undermine the SSA disability determination, noting that the records documented only that the daughter had undergone additional medical procedures that resolved "some of her pain." *Id.* Additionally, she permissibly relied on the daughter's uncontradicted testimony that she has not been released to do any level of work since her award of Social Security disability benefits, and still cannot bend, twist, lift, pull, sit, or stand for long periods. *Id.* Consequently, the administrative law judge determined no evidence called into question

the SSA disability award.[11] *Id.* We therefore affirm the administrative law judge's finding that claimant satisfied the disability requirement, as the administrative law judge's finding is consistent with the language of Section 725.209, and supported by substantial evidence. *Stanley*, 194 F.3d at 503; *Scalzo*, 6 BLR at 1-1019-20. We therefore affirm the administrative law judge's finding that claimant is entitled to augmented benefits on behalf of his daughter.[12] 20 C.F.R. §725.201(c).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[11] Employer does not contend that the Social Security Administration award of disability benefits to claimant's daughter was erroneous, or is no longer valid.

[12] We affirm as unchallenged on appeal the administrative law judge's determination that claimant is also entitled to augmented benefits on behalf of his spouse. *See Skrack*, 6 BLR at 1-711; Decision and Order at 4.