U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0312 BLA

LARRY G. WARD, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SPARTAN MINING COMPANY	)	
	)	DATE ISSUED: 05/09/2016
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 and the Decision and Order on Reconsideration of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Lindsey M. Sprolla (Cipriani & Werner, PC), Wheeling, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order and Decision and Order on Reconsideration (13-BLA-5369) of Administrative Law Judge Scott R. Morris 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 March 27, 2012. Director's Exhibits 2, 3.

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[1] the administrative law judge found that claimant has a history of 44.95 years of qualifying coal mine employment[2] and forty pack-years of cigarette smoking, and further found that the evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits. Employer filed a motion for reconsideration, which was denied by the administrative law judge on April 21, 2015.

On appeal, employer argues that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption. Specifically, employer argues that the administrative law judge erred in finding that claimant's above-ground coal mine employment was substantially similar to underground coal mine employment. Employer also contends that the administrative law judge did not apply the appropriate standard in rendering his findings on rebuttal, that he erred in weighing the relevant evidence, and that his decision violated the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, rational,

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more 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), as implemented by 20 C.F.R. §718.305(b).

[2] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibits 3, 6; Hearing Tr. at 18. Accordingly, this case arises within the jurisdiction 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).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 44.95 years of 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 7-11, 21.

and in accordance with applicable law. 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).

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

Employer contends that the administrative law judge erred in finding that claimant's above-ground work was substantially similar to underground coal mine employment, and therefore erred in finding that claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Section 411(c)(4) requires a claimant to establish at least fifteen years of employment either in "underground coal mines," or in "a coal mine other than an underground mine" in conditions that are "substantially similar" to those in an underground mine. 30 U.S.C. §921(c)(4).

Employer does not contest the administrative law judge's findings that claimant worked as an underground coal miner for nine years, from 1967 through 1976, and then worked above-ground, in various coal mine management positions, from 1976 to 2012. Decision and Order at 3-4, 7-11; Employer's Brief at 2. Nor does employer contest the administrative law judge's finding that all of claimant's coal mine employment was associated with underground mines.[4] Decision and Order at 3-4; Employer's Brief at 7-8. Rather, employer asserts that the record does not establish that claimant was regularly exposed to coal mine dust while working above-ground as a supervisor and that, therefore, the administrative law judge erred in finding that claimant's employment from

[4] A review of the evidence indicates that all of claimant's coal mine employment took place either underground, or above ground at the site of an underground mine. As summarized by the administrative law judge, claimant averred that beginning in 1967, he worked for forty-four years in underground mining, and that while employed by Massey Energy between 1976 and 2012 he "manag[ed] underground mines" and was "responsible for the production, cost and safety of the underground coal mines" as well as one preparation plant. Decision and Order at 3-4; Director's Exhibits 3, 4; Hearing Tr. at 18, 24. When asked whether all of the facilities where he worked were underground mining facilities, claimant responded: "Yes. Well, Elk Run had some attachment to a surface mine that I had little or nothing to do with and Marfork has some attachments to a surface mine that I had nothing to do with." Hearing Tr. at 33-34. Further, when asked if his "office was actually located on the underground mine facilities" during the times he worked as a mine manager, claimant responded: "It was located on the mine property," sometimes just inside the property and sometimes within three-hundred feet of the portal. Hearing Tr. at 32-33.

1976 to 2012 was performed in conditions that were substantially similar to those in an underground coal mine. Employer's Brief at 7-8. Employer's contention lacks merit.

Employer concedes that claimant's supervisory duties were performed in "an office, which was . . . on the coal mine property." Employer's Brief at 7. As the administrative law judge noted, the Board has held that a surface worker at an underground mine is not required to show comparability of environmental conditions in order to take advantage of the Section 411(c)(4) presumption, as it is the type of mine (underground or surface), rather than the location of the particular worker (on the surface or below the ground), which determines whether a claimant is required to show comparability of conditions. Decision and Order at 10, *citing Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-28-29 (2011); *see Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1058, 25 BLR 2-453, 2-468 (6th Cir. 2013) (no showing of comparability of conditions is necessary for an aboveground employee at an underground coal mine). Thus, contrary to employer's contention, claimant was not required to show comparability of environmental conditions in order to invoke the Section 411(c)(4) presumption. *See Muncy*, 25 BLR at 1-28-29; *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497, 1-501 (1979) (Smith, Chairman, dissenting). We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established 44.95 years of qualifying coal mine employment. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Muncy*, 25 BLR at 1-27-28.

In light of our affirmance of the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment, and his uncontested finding that claimant suffers from a totally disabling respiratory impairment, we affirm the administrative law judge's determination that claimant invoked the rebuttable presumption that the miner is totally disabled due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

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 does not have either legal or clinical pneumoconiosis,[5] 20

[5] "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

C.F.R. §718.305(d)(1)(i), 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)(ii). The administrative law judge found that employer failed to establish rebuttal by each method.

In evaluating whether employer established that claimant does not have legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Rasmussen, Gaziano, Zaldivar, and Fino. Dr. Rasmussen diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) with asthma due, in part, to coal mine dust exposure.[6] Director's Exhibit 12. Dr. Gaziano also diagnosed legal pneumoconiosis, in the form of COPD due to both coal mine dust exposure and smoking. Claimant's Exhibit 1. In contrast, Dr. Zaldivar opined that claimant does not have legal pneumoconiosis, but has an obstructive pulmonary impairment in the form of asthma, that was probably induced by cigarette smoke exposure, and is not related to coal mine dust exposure. Director's Exhibit 25; Employer's Exhibit 7 at 21-22. Similarly, Dr. Fino opined that claimant does not have legal pneumoconiosis, but has an obstructive pulmonary impairment primarily due to asthma, that is unrelated to coal mine dust exposure. Employer's Exhibits 2; 8 at 8, 15-16.

The administrative law judge accorded the "most weight" to the opinions of Drs. Rasmussen and Gaziano, and accorded "little weight" to the opinions of Drs. Zaldivar and Fino, and found that the "preponderance of the evidence, therefore, shows that [c]laimant has legal pneumoconiosis." Decision and Order at 29-30, 32. Therefore, the administrative law judge concluded that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis. Decision and Order at 32.

Employer asserts that the administrative law judge did not properly address whether the opinions of Drs. Zaldivar and Fino are sufficient to disprove the existence of legal pneumoconiosis, as defined at 20 C.F.R. §718.201. Employer's Brief at 9-14. Initially, employer asserts that the administrative law judge erred in discrediting the

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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).

[6] Dr. Rasmussen opined that 40% of claimant's chronic obstructive pulmonary disease (COPD) is due to coal mine dust exposure, 40% is due to cigarette smoking, and 20% is due to non-occupationally-related asthma. Director's Exhibit 12.

opinion of Dr. Zaldivar because he did not "rule out" coal mine dust exposure as a cause of claimant's impairment. Employer's Brief at 9, *citing* Decision and Order on Reconsideration at 5. Employer asserts that it is only required to demonstrate that claimant did not suffer from a chronic dust disease of the lungs that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Employer's Brief at 9, 11-12.

The administrative law judge correctly stated that, in order to rebut the presumption, employer must establish "[t]hat claimant does not have clinical or legal pneumoconiosis." Decision and Order at 22, *referencing* 20 C.F.R. §718.305(d)(2)(i). Contrary to employer's assertion, while the administrative law judge inartfully stated that "Dr. Zaldivar did not rule out why coal mine dust exposure could not have caused claimant's disease process," Decision and Order on Reconsideration at 5, the administrative law judge did not find Dr. Zaldivar's opinion insufficient to disprove the existence of legal pneumoconiosis on that basis. Rather, he found that Dr. Zaldivar's opinion on the existence of legal pneumoconiosis was not credible, taking into consideration the rationale he provided for why claimant does not have legal pneumoconiosis. Decision and Order at 30-31; Decision and Order on Reconsideration at 5. As summarized by the administrative law judge, Dr. Zaldivar attributed claimant's obstructive impairment to "longstanding asthma not related to his occupation" based, in part, on his opinion that the results of claimant's objective testing were "typical of asthma." Decision and Order on Reconsideration at 5; Employer's Exhibit 7 at 22-23. The administrative law judge permissibly found that while Dr. Zaldivar's explanation supported his diagnosis of asthma, Dr. Zaldivar did not sufficiently explain why coal mine dust exposure did not also contribute to, or aggravate, claimant's impairment. *See 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 on Reconsideration at 5; Employer's Exhibit 7 at 22-23. As the administrative law judge provided a valid basis for discrediting Dr. Zaldivar's opinion that claimant does not suffer from legal pneumoconiosis, this finding is affirmed. *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); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

We find merit, however, in employer's contention that the administrative law judge erred in his consideration of Dr. Fino's opinion. The administrative law judge correctly noted that while Dr. Fino specifically stated that claimant does not have legal pneumoconiosis, Dr. Fino acknowledged that he "[could] not exclude [claimant's] 45 years of working in the coal mines as playing some role in his obstruction." Employer's Exhibit 2. The administrative law judge stated that the phrase "some role" was open to interpretation, Decision and Order at 31 n.46, and that he "interpret[ed] Dr. Fino's conclusion to establish a relationship between the [c]laimant's exposure to coal mine dust

and his pulmonary disorder, *i.e.* COPD." Decision and Order at 31. Noting that the definition of legal pneumoconiosis set forth in the regulations encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment," the administrative law judge concluded that Dr. Fino's opinion met "the very definition of legal pneumoconiosis" and "serve[d] to strengthen [his] findings that the Employer has unsuccessfully rebutted the presumption that claimant has legal pneumoconiosis . . . ." Decision and Order at 31, *citing* 20 C.F.R. §718.201(b). On reconsideration, the administrative law judge clarified that he did not intend to imply that Dr. Fino had actually diagnosed legal pneumoconiosis. Decision and Order on Reconsideration at 6 n.8. Rather, the administrative law judge stated, he found that Dr. Fino's opinion was "consistent with a finding of legal pneumoconiosis . . . ." *Id.* Thus, the administrative law judge declined to alter his conclusion that Dr. Fino's opinion did not aid employer in establishing rebuttal by disproving the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(2)(i).

Employer asserts that the administrative law judge mischaracterized Dr. Fino's opinion. Employer's Brief at 11 n.7. We agree. While Dr. Fino conceded that claimant's obstructive impairment may be due in part to coal mining, he specifically stated that the degree of obstruction related to coal mine dust is *not clinically significant*.[7] Employer's Exhibit 2 at 6-7 (emphasis added). Thus, contrary to the administrative law judge's findings, as Dr. Fino opined that claimant does not have clinical pneumoconiosis and that any contribution by coal mine dust to claimant's obstructive impairment is clinically insignificant, his opinion, if found to be credible by the administrative law judge, could establish that claimant does not have legal pneumoconiosis, as defined at 20 C.F.R. §718.201. Thus, substantial evidence does not support the administrative law judge's conclusion that Dr. Fino's opinion is "consistent with a finding of legal pneumoconiosis." *See Compton*, 211 F.3d at 207-208, 22 BLR at 2-168; *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir 1997). Moreover, while the administrative law judge ultimately accorded Dr. Fino's opinion "little weight," a review of the administrative law judge's decision does not reveal any reasons for discounting Dr. Fino's opinion. Thus, the administrative law judge's decision also fails to comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). We must therefore vacate the

[7] Dr. Fino attributed claimant's obstructive impairment to asthma, which he emphasized was not significantly related to, or substantially aggravated by, coal mine dust exposure. Employer's Exhibit 8 at 8-10, 15-16. In acknowledging that he could not exclude forty-five years of working in the coal mines as having "some role" in claimant's obstructive impairment, Dr. Fino repeatedly stated that the amount of obstruction related to coal mine dust is not clinically significant. Employer's Exhibit 2 at 6-7.

administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption.

On remand, because employer bears the burden of proof on rebuttal, the administrative law judge must consider Dr. Fino's opinion, in its entirety, together with the other credible medical opinions of record,[8] and determine whether Dr. Fino's opinion is sufficient to carry employer's burden to establish that claimant does not have legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); *Compton*, 211 F.3d at 211, 22 BLR at 2-175; Clark *v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). In resolving any conflicts among the medical opinions, the administrative law judge must explain his findings. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803, 21 BLR 2-302, 2-311 (4th Cir. 1998); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Because we have vacated the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis, we also vacate 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).

We also vacate the administrative law judge's related finding that employer failed to establish that no part of claimant's respiratory or pulmonary disability is caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 32.

On remand, the administrative law judge should begin his analysis at 20 C.F.R. §718.305(d)(1)(i)(A) by considering all relevant and credible evidence to determine whether employer has proved that claimant does not have legal pneumoconiosis, as defined in 20 C.F.R. §718.201(a)(2). Even if legal pneumoconiosis is not disproved, the

[8] Employer also contends that the administrative law judge erred in finding the opinions of Drs. Rasmussen and Gaziano to be reasoned and documented relevant to the existence of legal pneumoconiosis. Whether a medical opinion is reasoned and documented is within the discretion of the administrative law judge. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12, 22 BLR 2-162, 2-175-76 (4th Cir. 2000); *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 specifically found that Drs. Rasmussen and Gaziano based their diagnoses of legal pneumoconiosis on claimant's medical and exposure histories, and the results of the objective testing and physical examinations they performed. Decision and Order at 29-30. Therefore, substantial evidence supports the administrative law judge's permissible finding that the opinions of Drs. Rasmussen and Gaziano are reasoned and documented. *See Compton*, 211 F.3d at 211-12, 22 BLR at 2-175-76; Decision and Order at 29-30.

administrative law judge must determine whether employer has disproved the existence of clinical pneumoconiosis[9] arising out of coal mine employment at 20 C.F.R. §718.305(d)(1)(i)(B), as both of these determinations are necessary to satisfy the statutory mandate to consider all relevant evidence pursuant to 30 U.S.C. §923(b), and to provide a framework for the analysis of the credibility of the medical opinions at 20 C.F.R. §718.305(d)(1)(ii), the second method of rebuttal. *See Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring & dissenting). If the administrative law judge finds that employer has disproved the existence of both legal and clinical pneumoconiosis, employer has rebutted the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(i), and the administrative law judge need not reach the issue of disability causation. If employer fails to rebut the presumption at 20 C.F.R. §718.305(d)(1)(i), the administrative law judge must determine whether employer is able to rebut the presumed fact of disability causation at 20 C.F.R. §718.305(d)(1)(ii) with credible proof that no part, not even an insignificant part, of claimant's pulmonary or respiratory disability was caused by either legal or clinical pneumoconiosis. *See Minich*, 25 BLR at 1-159; *see also West Virginia CWP Fund v. Bender*, 782 F.3d 129, 143-44, BLR (4th Cir. 2015).

[9] With respect to whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge found that the weight of the x-ray evidence is negative for pneumoconiosis, and that the record contains no biopsy or autopsy evidence. Decision and Order at 24; *see* 20 C.F.R. §718.202(a)(1), (2). However, the administrative law judge did not conduct an analysis of the medical opinions, or make an explicit finding, considering all of the relevant evidence, as to whether employer disproved the existence of clinical pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Reconsideration are affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge