U.S. Department of Labor

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

BRB Nos. 16-0389 BLA
and 16-0389 BLA-A

TEDDY C. LESTER	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
PETER WHITE COAL MINING CORPORATION	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 05/25/2017
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Andrea L. Berg and Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits (2012-BLA-06142) of Administrative Law Judge Theresa C. Timlin 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 subsequent claim filed on March 9, 2011.[1]

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with at least fifteen years of qualifying coal mine employment and accepted the parties' stipulation 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(c) and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). The administrative law judge also found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that it failed to rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. Claimant also filed a cross-appeal, asserting additional reasons for why the opinions of Drs. Fino and Castle are insufficient to rebut the Section

[1] This is claimant's second claim. Director's Exhibit 3. Claimant filed his first claim on July 1, 1996. Director's Exhibit 1. It was finally denied by the district director on September 20, 1996 because claimant failed to establish the existence of pneumoconiosis and total respiratory disability. *Id.*

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the 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 determined that claimant's Social Security Administration Earnings Records "demonstrate[d] 18.70 years of 'regular' coal mine employment." Decision and Order at 16. The administrative law judge also determined that "[c]laimant credibly demonstrated that the dust conditions he experienced throughout the entirety of his coal mine career were 'substantially similar' to conditions in an underground mine." *Id.* at 17.

411(c)(4) presumption. Employer has filed a combined response and reply brief, reiterating its prior arguments on appeal and urging the Board to decline to address claimant's arguments raised on cross-appeal. The Director, Office of Workers' Compensation Programs, did not file a brief in either appeal.[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 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, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[6] 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)(i), (ii). The administrative law judge found that employer failed to rebut the presumption by either method.

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[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The record indicates that claimant's last coal mine employment was in West Virginia. 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).

[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). 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 coal dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

A. Existence of Legal Pneumoconiosis

In addressing whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered Dr. Forehand's opinion that claimant has legal pneumoconiosis,[7] Director's Exhibit 14; Claimant's Exhibit 5 at 14, and the opinions of Drs. Castle[8] and Fino[9] that claimant does not have legal pneumoconiosis, Director's Exhibit 37; Employer's Exhibits 8, 11 at 15. The administrative law judge found that all three physicians were equally qualified to render a medical opinion in this case. Decision and Order at 31. The administrative law judge gave "normal probative weight" to Dr. Forehand's opinion because she found that it was well-reasoned. The administrative law judge gave little probative weight to the opinions of Drs. Castle and Fino because she found that they were not well-documented or well-reasoned. Consequently, the administrative law judge found that Dr. Forehand's opinion outweighed the contrary opinions of Drs. Castle and Fino. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis.

Employer argues that the administrative law judge erred "in determining that Dr. Forehand's opinion was entitled to equal weight with Drs. Castle and Fino's assessments based on the doctors' respective credentials." Employer's Brief at 11. Employer specifically argues that the administrative law judge mischaracterized Dr. Forehand's credentials by finding that he is Board-certified in pulmonology. *Id.* Contrary to

[7] In his April 13, 2011 report and October 29, 2013 deposition, Dr. Forehand opined that claimant has chronic obstructive pulmonary disease caused by both coal dust exposure and cigarette smoking. Director's Exhibit 14; Claimant's Exhibit 5 at 30, 48-49.

[8] In a report dated April 2, 2012, Dr. Castle opined that "[claimant] does not suffer from legal pneumoconiosis because the disabling respiratory impairment present is entirely due to bronchial asthma and tobacco smoke[-]induced airway obstruction." Employer's Exhibit 8. Dr. Castle further opined that "[claimant] does not have a chronic dust disease of the lungs or the sequelae thereof that has been caused by, contributed to, or substantially aggravated by coal mine dust exposure." *Id*. In a deposition dated December 6, 2013, Dr. Castle opined that "[claimant] has tobacco smoke-induced airway obstruction and bronchial asthma as a cause of his impairment rather than coal mine dust-induced lung disease." Employer's Exhibit 11 at 16.

[9] In his November 9, 2011 report and November 6, 2013 deposition, Dr. Fino opined that claimant does not have legal pneumoconiosis but suffers from severe emphysema related to cigarette smoking. Director's Exhibit 37; Employer's Exhibit 10 at 25-26.

employer's argument, the administrative law judge did not find that Dr. Forehand is Board-certified in pulmonology. Rather, consistent with Dr. Forehand's credentials of record, the administrative law judge stated that "Dr. Forehand is Board[-]certified in Pediatrics, with a subspecialty in Pulmonology and is a certified B reader."[10] Decision and Order at 31. Further, there is no merit to employer's contention that the administrative law judge selectively analyzed the evidence in finding Drs. Forehand, Castle, and Fino to be equally qualified. Employer's Brief at 12. The administrative law judge recognized that Drs. Castle and Fino are both Board-certified in Internal Medicine, which Dr. Forehand is not, and also referenced their additional professional accomplishments as set forth on their curricula vitae and in their deposition testimony. Decision and Order at 27, 29-30, 31, *referencing* Director's Exhibit 37; Employer's Exhibits 9; 10 at 4-5; 11 at 4, 5-6, 9, 11. The administrative law judge permissibly found, however, that Dr. Forehand is similarly qualified to Drs. Castle and Fino because his lack of Board-certification in Internal Medicine "is overcome by the length and nature of his medical practice" in evaluating more than 8,000 miners for the presence of pneumoconiosis.[11] Decision and Order at 31; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). Thus, we affirm the administrative law judge's determination that Drs. Forehand, Castle, and Fino are equally qualified to render an opinion in this case.

Employer also argues that the administrative law judge erred in summarily crediting Dr. Forehand's opinion as well-reasoned. Employer contends that Dr. Forehand's opinion is inadequately explained, contrary to law, and inconsistent with the preamble to the revised regulations. Employer's Brief at 13-15. We disagree. The administrative law judge fully considered Dr. Forehand's opinion and noted that, in diagnosing legal pneumoconiosis, Dr. Forehand adequately accounted for claimant's coal mine dust exposure and smoking histories,[12] and based his diagnosis on his review of

[10] The record reveals that Dr. Forehand is Board-certified in Pediatrics, Board-certified in Allergy and Immunology, Board-eligible in Pediatric Pulmonary Medicine, and a B reader. Director's Exhibit 14; Claimant's Exhibit 5 at 4, 5.

[11] The administrative law judge noted that "Dr. Forehand estimated that he had examined more than 8,000 miners for the [Department of Labor's] black lung program since 1993." Decision and Order at 31, *citing* Claimant's Exhibit 5 at 7. The administrative law judge also noted Dr. Forehand's testimony that he had intensive training in Pulmonology. Decision and Order at 24, *citing* Claimant's Exhibit 5 at 6.

[12] The administrative law judge found that "[c]laimant carried a fifty-pack year smoking history." Decision and Order at 6. The administrative law judge permissibly found that Dr. Forehand's initial reliance on an underestimated smoking history of thirty-

medical records, the results of his objective testing, and "his abnormal exam of the chest." Decision and Order at 24; Director's Exhibit 14; Claimant's Exhibit 5. Contrary to employer's contention, Dr. Forehand's statement that the positive x-ray results further supported his conclusion that claimant's impairment is due, in part, to coal mine dust exposure, did not render his opinion contrary to law. *See* 20 C.F.R. §718.202(a)(4) ("[a] determination of the existence of pneumoconiosis may . . . be made if a physician, exercising sound medical judgment, notwithstanding a *negative X-ray*, finds that the miner suffers or suffered from pneumoconiosis as defined in [20 C.F.R.] § 718.201") (emphasis added); Employer's Brief at 13; Claimant's Exhibit 5 at 14-15. Nor did Dr. Forehand opine, contrary to the preamble to the revised regulations, that because it is "impossible" to differentiate between the causes of obstructive lung disease, "any miner who develops obstructive lung disease would automatically have legal pneumoconiosis." Employer's Brief at 14-15. Employer has taken Dr. Forehand's statements out of context. As the administrative law judge correctly noted, Dr. Forehand explained that because the effects of cigarette smoking are "superimposed" on the adverse effects of coal mine dust exposure, and because the effects are additive, it is "very difficult" to assign a percentage to the etiology of claimant's impairment. Decision and Order at 24-25; Claimant's Exhibit 5 at 18, 52, 56. Further, Dr. Forehand acknowledged that claimant's obstructive impairment could be solely caused by his cigarette smoking history, but explained that "in this specific case," the length of time claimant was exposed to coal mine dust, the length of time he smoked cigarettes, and the pattern of his impairment made it "more likely than not that this was a multifactorial disease" due to both his cigarette smoking and his coal mine dust exposure "to a significant degree." Claimant's Exhibit 5 at 57-58, 60-61; Decision and Order at 25.

Whether a medical opinion is reasoned is a question for the trier of fact. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-34, 21 BLR 2-323, 2-334-37 (4th Cir. 1998); *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1977). Here, the administrative law judge explained her findings, and substantial evidence supports her permissible determination that Dr. Forehand provided a well-reasoned opinion regarding the presence of legal pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-09, 22 BLR 2-162, 2-169-70 (4th Cir. 2000); *Hicks*, 138 F.3d at 532-34, 21 BLR at 2-334-37 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438,

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nine or forty years did not undermine his opinion, as Dr. Forehand testified that a fifty-pack year smoking history would not change his diagnosis that claimant suffers from legal pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-34, 21 BLR 2-323, 2-334-37 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Decision and Order at 32.

441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Decision and Order at 24-25, 32. Moreover, in asserting that Dr. Forehand's opinion is not credible, employer is asking for a reweighing of the evidence, which the Board is not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Therefore, we affirm the administrative law judge's finding that Dr. Forehand's opinion is entitled to "normal probative weight." Decision and Order at 32.

Employer also argues that the administrative law judge erred in discounting the opinions of Drs. Castle and Fino. Employer contends that the administrative law judge applied an incorrect rebuttal standard in evaluating their opinions. Employer specifically asserts that the administrative law judge's statement that "[c]laimant is presumed to have legal pneumoconiosis," Decision and Order at 33, 34, is "incorrect and heightened the standard required of an employer" by "essentially requiring [employer] to rule out legal pneumoconiosis." Employer's Brief at 15-16.

Employer's contention lacks merit. The administrative law judge correctly stated that once the Section 411(c)(4) presumption is invoked, the party opposing entitlement bears the burden "to demonstrate by a preponderance of the evidence that claimant does not suffer from pneumoconiosis." Decision and Order at 11, *citing* 20 C.F.R. §718.305(d). The administrative law judge also correctly stated that, because the presumption was invoked, "[c]laimant is presumed to have legal pneumoconiosis." Decision and Order at 34; *see* 20 C.F.R. §718.305(d)(1)(i). Moreover, contrary to employer's assertion, the administrative law judge determined that employer did not disprove the existence of legal pneumoconiosis because the opinions of its physicians were not credible, not because of her application of a particular rebuttal standard. *See Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting); Decision and Order at 33-34.

Specifically, the administrative law judge correctly noted that "Dr. Castle felt that [c]laimant did not have legal pneumoconiosis, in part, because he carried 'a mild degree of hypoxemia and a mild degree of hypercapnia,' which is 'not a *typical* finding of coal workers' pneumoconiosis,' but is typical of smoking and bronchial asthma." Decision and Order at 33; Employer's Exhibits 8, 11 at 19, 23. The administrative law judge permissibly found Dr. Castle's opinion to be "overly generalized" and entitled to "little probative weight," in part, because "he never explained why [c]laimant's legal pneumoconiosis could not have presented in this atypical way." Decision and Order at 33; *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103-4 (7th Cir. 2008); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

The administrative law judge also considered Dr. Fino's opinion that claimant does not have legal pneumoconiosis because his "work history [as an above ground miner

was] not one that would be expected to cause significant emphysema." Decision and Order at 34. The administrative law judge also noted that "[Dr. Fino] cited to Dr. Cohen's finding that only six to eight percent of miners experienced significant obstruction due to coal mine dust exposure." *Id*. The administrative law judge permissibly found Dr. Fino's opinion entitled to little probative weight, in part, because "[her] finding of fact regarding the comparability of [c]laimant's dust exposure to underground coal mines contradicts the premise of Dr. Fino's argument (that the nature of [c]laimant's coal dust exposure was insufficient to have caused his emphysema)." Decision and Order at 34; *see Hicks*, 138 F.3d at 532-34, 21 BLR at 2-334-37; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. The administrative law judge further permissibly discounted Dr. Fino's opinion because "Dr. Fino's reliance on Dr. Cohen's findings was not particularized to the [c]laimant's condition" and he "included no evidence to show that [c]laimant could not belong to the subset of miners who develop significant coal-mine-dust-induced obstructive lung disease." Decision and Order at 34; *see Beeler*, 521 F.3d at 726, 24 BLR at 2-103-4; *Knizer*, 8 BLR at 1-7.

Because the administrative law judge permissibly accorded less weight to the opinions of Drs. Castle and Fino that claimant does not have legal pneumoconiosis than to the contrary opinion of Dr. Forehand,[13] we affirm the administrative law judge's finding that employer failed to rebut the presumption at 20 C.F.R. §718.305(d)(1)(i).[14]

B. Causal Relationship

Upon finding that employer was unable to disprove the existence of legal pneumoconiosis, the administrative law judge addressed whether employer could establish 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 discredited the opinions of Drs. Castle and Fino that claimant's pulmonary impairment was not caused by pneumoconiosis, in part, because the physicians did not diagnose legal pneumoconiosis, which is contrary to the

[13] Because the administrative law judge provided valid reasons for discounting the opinions of Drs. Castle and Fino, we need not address employer's remaining arguments regarding the weight she accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Employer's Brief at 22-23.

[14] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Thus, we need not address employer's contentions regarding the administrative law judge's finding that employer also failed to disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

administrative law judge's finding that employer failed to disprove the existence of the disease. *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); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 39. We, therefore, 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. *See* 20 C.F.R. §718.305(d)(1)(ii).

In view of the foregoing, we affirm the administrative law judge's determinations that employer did not satisfy its burden to rebut the Section 411(c)(4) presumption, and that claimant is entitled to benefits.[15] *See* 30 U.S.C. §921(c)(4).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

[15] In view of our affirmance of the administrative law judge's award of benefits, we need not address the arguments raised in claimant's cross-appeal. *See Larioni*, 6 BLR at 1-1278.