U.S. Department of Labor

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

BRB No. 16-0406 BLA

DANIEL MOORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOR COAL, INCORPORATED	)	DATE ISSUED: 05/02/2017
	)	
and	)	
	)	
SECURITY INSURANCE OF HARTFORD	)	
	)	
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 Awarding Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

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

Denise Kirk Ash, Lexington, Kentucky, for employer/carrier.

Sarah M. Hurley (Nicholas C. Geale, Acting Solicitor of Labor; Maia 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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2012-BLA-05540) of Administrative Law Judge Richard M. Clark, rendered on a subsequent claim filed on June 8, 2009,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge determined that claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, thereby establishing a change in a condition of entitlement[2] and invoking the rebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b).[3] The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

[1] Claimant filed an initial claim for benefits on August 14, 1995, which was denied by the district director because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant filed a second claim for benefits on November 15, 2006, which was denied by the district director because, although claimant established the existence of pneumoconiosis arising from his coal mine employment, he did not establish that he was totally disabled. Director's Exhibit 2. Claimant requested modification, which was denied by the district director. *Id*. Claimant did not take any further action until filing the current subsequent claim. Director's Exhibit 4.

[2] 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 "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); *White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3).

[3] Under Section 411(c)(4) of the Act, a miner's total disability is presumed to be due to pneumoconiosis if he had 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), as implemented by 20 C.F.R. §718.305(b).

On appeal, employer argues that the administrative law judge erred in determining that it did not rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited brief.[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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Rebuttal of the Presumption

Once claimant invokes the Section 411(c)(4) presumption of total disability due to pneumoconiosis,[6] the burden shifts to employer to rebut the presumption by establishing

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant: has at least fifteen years of qualifying coal mine employment; established total disability at 20 C.F.R. §718.204(b)(2); established a change in an applicable condition of entitlement at 20 C.F.R. §725.309; and invoked the rebuttable presumption at Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6, 13, 14. Although employer does not challenge the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption, employer states that it reserves its right to challenge the constitutionality and applicability of amendments to the Black Lung Benefits Act contained in the Patient Protection and Affordable Care Act, Public Law No. 111-148, at a later time. The Director, Office of Workers' Compensation Programs, responds that any future challenges by employer are without merit, as "Section 411(c)(4) and its implementing regulations have routinely been upheld." Director's Brief at 3; *see e.g., Vision Processing, LLC v. Groves*, 705 F.3d 551, 25 BLR 2-231 (6th Cir. 2013); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 25 BLR 2-689 (4th Cir. 2015); *B & G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011).

[5] Claimant's last coal mine employment occurred in Kentucky. Director's Exhibit 5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[6] In the context of challenging the administrative law judge's findings on rebuttal, employer states that Dr. Broudy's opinion is reasoned to prove that claimant's respiratory

that claimant has neither legal nor clinical pneumoconiosis, or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 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, 1-154-46 (2015) (Boggs, J., concurring and dissenting). Employer relies on Dr. Broudy's opinion to establish rebuttal under both methods.

In considering whether employer disproved the existence of legal pneumoconiosis,[7] the administrative law judge found that Dr. Broudy's opinion was not sufficiently reasoned to satisfy employer's burden of proof. Employer generally asserts that Dr. Broudy's opinion is reasoned and that the administrative law judge erred in discrediting his opinion that claimant does not have legal pneumoconiosis. We disagree.

Dr. Broudy opined that there "is no evidence that coal dust was a significant cause of [claimant's] respiratory impairment" because the results of the pulmonary function studies "actually show large lungs with airways obstruction which is not the typical type of impairment associated with coal dust exposure" and "there was some improvement after bronchodilation which again is not [the] typical impairment due to coal dust exposure."[8] Employer's Exhibit 2. However, as noted by the administrative law judge,

---

disability is due to "claimant's non-occupational medical conditions." Employer's Brief at 8. To the extent employer's argument can be interpreted to assert that claimant is not totally disabled by a respiratory impairment for the purposes of Section 411(c)(4), that argument is rejected. Dr. Broudy stated that claimant has a severe respiratory impairment that prevents him from performing the work of a miner. Director's Exhibit 15. The fact that Dr. Broudy may have attributed some part of claimant's respiratory disability to non-occupational conditions is immaterial when considering the invocation of the 15-year presumption. *See* 20 C.F.R. §§718.204(a), (c), 718.305(d); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81, 13 BLR 2-196, 212-13 (10th Cir. 1989).

[7] The administrative law judge determined that employer established that claimant does not suffer from clinical pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(B). Decision and Order at 15.

[8] Dr. Broudy indicated that claimant's pulmonary function studies showed a ten percent improvement in the FEV1 after bronchodilation. Employer's Exhibit 2.

"[w]ith one exception, [c]laimant's pulmonary function studies produced qualifying values both before and after bronchodilation." Decision and Order at 17. The administrative law judge therefore permissibly found that Dr. Broudy's opinion was not persuasive, as Dr. Broudy failed to explain why claimant's coal dust exposure did not contribute to "[c]laimant's residual fixed [or non-reversible] impairment." *Id., citing Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004). The partial reversibility in the results of some of claimant's pulmonary function studies conducted post-bronchodilator does not necessarily eliminate a diagnosis of legal pneumoconiosis. *Barrett*, 478 F.3d at 356, 23 BLR at 2-483.

The administrative law judge also correctly found that Dr. Broudy did not offer any support for his summary statement that airways obstruction "is not the typical type of impairment associated with coal dust exposure." Decision and Order at 18; Employer's Exhibit 2 at 4; *see* 20 C.F.R. §718.201(a)(2) (recognizing that legal pneumoconiosis may include an obstructive impairment arising out of coal dust exposure). Further, the administrative law judge permissibly rejected this explanation as Dr. Broudy did not explain why "[c]laimant's impairment is not one of the 'atypical' cases, where his exposure to coal dust resulted in an obstructive impairment." Decision and Order at 18, *quoting* Employer's Exhibit 2; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Additionally, the administrative law judge permissibly found Dr. Broudy's statements that claimant's impairment "may be" or was "probably" due to smoking, and that "cardiomyopathy can account for some of [claimant's] respiratory impairment" to be equivocal. Decision and Order at 18, *quoting* Director's Exhibit 15; Employer's Exhibit 2; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987). The administrative law judge observed correctly that employer is required to affirmatively disprove that claimant has legal pneumoconiosis and rationally found that Dr. Broudy did not explain why claimant's coal dust exposure did not contribute to claimant's respiratory disability even if smoking were the primary cause. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Clark*, 12 BLR at 1-155; Decision and Order at 18.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because the

administrative law judge provided valid reasons for discrediting Dr. Broudy's opinion, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis,[9] and that employer did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).

In finding that employer failed to disprove the presumed fact of disability causation, the administrative law judge relied on his determination that Dr. Broudy's opinion was not reasoned on the issue of the existence of legal pneumoconiosis. Decision and Order at 18. Because we have affirmed the administrative law judge's finding that Dr. Broudy's opinion was not reasoned to disprove the existence of legal pneumoconiosis, we see no error in the administrative law judge's conclusion that Dr. Broudy's opinion is insufficient to establish that no part of claimant's respiratory disability was caused by legal pneumoconiosis. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1070, 25 BLR 2-431, 2-452 (6th Cir. 2013); Decision and Order at 18. We affirm, therefore, the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii), and the award of benefits.

[9] The administrative law judge found that the prior claim evidence did not aid employer in disproving the presumed facts of the existence of legal pneumoconiosis or disability causation. We affirm those findings as they are unchallenged by employer. *Skrack*, 6 BLR at 1-711. Because employer has the burden of proof and we affirm the administrative law judge's determination that employer's evidence is insufficient to disprove legal pneumoconiosis, it is not necessary that we address employer's contentions regarding the weight accorded claimant's evidence. *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

JONATHAN ROLFE
Administrative Appeals Judge