U.S. Department of Labor

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

BRB Nos. 16-0423 BLA
and 16-0423 BLA-A

JAMES E. CARTER	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 05/22/2017
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Awarding Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Andrea L. Berg (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits (2013-BLA-05427) of Administrative Law Judge Scott R. Morris on a subsequent claim[1] filed on March 23, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

Employer stipulated, and the administrative law judge found, that claimant has thirty-five years of underground coal mine employment[2] and a totally disabling pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the presumption set forth at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[3] that he is totally disabled due to pneumoconiosis, and established a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(c). The administrative law judge also found that employer failed to rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. Claimant has also filed a cross-appeal providing additional reasons for the administrative law judge to find that employer cannot rebut the Section 411(c)(4) presumption, should the Board vacate the award of benefits and remand this case.[4]

[1] Claimant filed three previous claims, all of which were finally denied. Director's Exhibits 1-3. Claimant's most recent prior claim, filed on January 31, 2002, was denied by the district director on July 2, 2003 because claimant did not establish any of the elements of entitlement. Director's Exhibit 3.

[2] Claimant's coal mine employment was in West Virginia. Director's Exhibit 6; Hearing Transcript at 14. 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] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis when the miner has fifteen or more 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.

[4] Claimant's cross-appeal was unnecessary. A cross-appeal permits the party that prevailed before the administrative law judge to challenge "any adverse findings of fact or conclusions of law" in the proceedings below. 20 C.F.R. §802.201(a)(2). Claimant, however, does not challenge any adverse determinations, but merely offers additional reasons for the administrative law judge to find that employer cannot rebut the Section 411(c)(4) presumption, should the case be remanded. Claimant's Cross-Appeal at 20-25.

Employer has filed a combined response and reply brief, reiterating its contentions on appeal. The Director, Office of Workers' Compensation Programs, declined to file a substantive 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. 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 of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[6] 20 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).

Employer argues that the administrative law judge erred in finding that employer failed to establish that claimant does not have legal pneumoconiosis. Employer's Brief at 14-19. In considering the medical opinion evidence, the administrative law judge determined that the opinions of Drs. Gaziano and Rasmussen that claimant has legal

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As the respondent here, claimant should have made any arguments in support of the decision below without filing a cross-appeal. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 369-70, 18 BLR 2-113, 2-120-21 (4th Cir. 1994).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant has thirty-five years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, that claimant invoked the Section 411(c)(4) presumption, and that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-4.

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

pneumoconiosis had "significant probative value" and outweighed the "less reasoned" contrary opinions of Drs. Zaldivar and Castle.[7] Decision and Order at 34-38. The administrative law judge therefore concluded that employer offered "no credible evidence that Claimant does not suffer from legal pneumoconiosis," and found that employer failed to rebut the presumption pursuant to 20 C.F.R. §718.305(d)(1)(i). *Id*. at 45.

Employer first argues that the administrative law judge did not determine whether the physicians' qualifications made their opinions more or less credible, as employer contends he was required to do. Employer's Brief at 15; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998). This argument lacks merit. Contrary to employer's suggestion, the administrative law judge was not required to find any opinions more or less credible based on the physicians' credentials; he was required to take the physicians' qualifications into account in determining the credibility of their opinions. *See Hicks*, 138 F.3d at 536, 21 BLR at 2-341. The administrative law judge did so, citing the credentials of all four physicians and permissibly finding that all of them "possess credentials that make them well-qualified to offer an opinion on whether [c]laimant suffers from pneumoconiosis."[8] *See Hicks*, 138 F.3d at 536, 21 BLR at 2-341; Decision and Order at 24-34.

Next, employer argues that the administrative law judge applied an incorrect standard when weighing the opinions of Drs. Gaziano, Rasmussen, Zaldivar and Castle. Employer's Brief at 15-16. This argument lacks merit. As the administrative law judge recognized, to disprove the existence of legal pneumoconiosis, employer had to establish by a preponderance of the evidence that claimant's lung disease or impairment was not "significantly related to, or substantially aggravated by" dust exposure in coal mine employment. *See* 20 C.F.R. §§718.305(d)(1)(i)(A), 718.201(a)(2), (b); Decision and Order at 8-9. Although employer contends that the administrative law judge imposed a higher stander and required it to "rule out" any contribution from coal mine dust exposure

[7] The record also contains a 1979 medical opinion from Dr. Ataii and a 2002 opinion from Dr. Ranavaya to which the administrative law judge assigned little probative value because neither physician had the benefit of considering subsequent medical data. Decision and Order at 34.

[8] The administrative law judge noted that Drs. Gaziano, Zaldivar, Castle and Rasmussen were all B readers and Board-certified in internal medicine. Decision and Order at 35. He also noted that Drs. Gaziano, Zaldivar and Castle were Board-certified in pulmonary disease, and Dr. Rasmussen was "a Senior Disability Analyst and Diplomate of the American Board of Disability Analysts." *Id*. Finally, the administrative law judge noted Dr. Zaldivar's Board-certification in critical care medicine, and Dr. Rasmussen's Board-certification in forensic examination and forensic medicine. *Id*.

to claimant's totally disabling impairment,[9] the administrative law judge only used the phrase "rule out" to summarize the opinions of Drs. Gaziano and Rasmussen that they could not rule out coal mine dust exposure as a cause of claimant's obstructive lung disease. Decision and Order at 37; Employer's Exhibit 9 at 24; Claimant's Exhibit 10 at 19, 44. Contrary to employer's contention, the administrative law judge did not impose a "rule out" or "no part" standard on the opinions of Drs. Zaldivar and Castle, and he ultimately concluded that employer "offered no credible evidence" to establish that claimant does not have legal pneumoconiosis. Decision and Order at 36-37, 45.

Employer also contends that the administrative law judge erred in discrediting the opinions of Drs. Zaldivar and Castle, both of whom excluded coal dust exposure as a cause or contributing factor in claimant's obstructive impairment. Employer's Brief at 17-19. We disagree. Dr. Zaldivar attributed claimant's impairment to emphysema and pulmonary fibrosis resulting from smoking. Employer's Exhibits 6 at 8, 11 at 28. Although he acknowledged that pneumoconiosis can be a progressive and latent disease, Dr. Zaldivar testified that claimant's impairment is due to smoking and not coal dust exposure because claimant continued to smoke after stopping work in the mines in 1995. Employer's Exhibit 11 at 6, 8, 13, 30-33. Similarly, Dr. Castle diagnosed emphysema due to tobacco smoke rather than coal dust exposure. Employer's Exhibit 3 at 17-18. Although he acknowledged that pneumoconiosis can be latent and progressive, Dr. Castle testified that smoking was the most likely cause of claimant's impairments because claimant's smoking continued "long after he left the coal mining industry in 1995," and that claimant "developed significant disease with the . . . ongoing exposure to tobacco smoke of a significant degree[.]" Employer's Exhibit 12 at 45-46.

The administrative law judge discredited both opinions for relying on the fact that claimant continued to smoke after retiring from mining to conclude that coal dust exposure did not affect his pulmonary condition. Decision and Order at 36-37 (citing *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488, 25 BLR 2-135, 2-151 (6th Cir. 2012). The administrative law judge noted that the opinions of Drs. Zaldivar and Castle are inconsistent with the regulations, which recognize pneumoconiosis as "a latent and progressive disease which may first become detectable only after cessation of coal mine dust exposure." 20 C.F.R. §718.201(c). Discrediting the opinions on that basis was permissible. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506, 25 BLR 2-713, 2-723

[9] A "rule out" standard applies only to the second method of rebutting the Section 411(c)(4) presumption, where employer must establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. . . ." 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 502, 25 BLR 2-713, 2-716 (4th Cir. 2015); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155-56 (2015) (Boggs, J., concurring and dissenting).

(4th Cir. 2015). Moreover, the administrative law judge also permissibly discredited these opinions for failing to consider whether smoking and coal dust exposure both contributed to claimant's impairment, noting the Department of Labor's acceptance of the view that they have additive effects on pulmonary and respiratory function. *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); *Hicks*, 138 F.3d at 532 n.9, 21 BLR at 2-335 n.9; Decision and Order at 37; *see also* 20 C.F.R. §718.201(a)(2), (b).

Because the administrative law judge permissibly discounted the opinions of Drs. Zaldivar and Castle, we affirm his finding that employer failed to establish that claimant does not suffer from legal pneumoconiosis.[10] 20 C.F.R. §718.305(d)(1)(i)(A). Consequently, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(i).[11] *Id*.

Finally, we reject employer's argument that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption by ruling out pneumoconiosis as a cause of claimant's total disability, pursuant to 20 C.F.R. §718.305(d)(1)(ii). Employer's Brief at 19. Finding the disability causation opinions of Drs. Zaldivar and Castle "inextricably linked" to their faulty opinions that claimant does not have legal pneumoconiosis, the administrative law judge permissibly found their opinions unpersuasive in establishing that no part of claimant's disability was caused by pneumoconiosis. *See Epling*, 783 F.3d at 505, 25 BLR at 2-720-22; Decision and Order at 46-48. The administrative law judge also reasonably found that their opinions did not adequately explain why pneumoconiosis was not at least a partial cause of claimant's disability — even if they assumed that claimant has pneumoconiosis, as Dr. Zaldivar did

[10] We need not address employer's remaining arguments regarding the weight given to the opinions of Drs. Zaldivar and Castle, because the administrative law judge provided at least two valid bases for discrediting them. Employer's Brief at 18-19. Any error in discounting their opinions for other reasons constitutes harmless error. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Nor do we need to address employer's arguments that the administrative law judge erred in crediting the opinions of Drs. Gaziano and Rasmussen, which cannot assist employer in establishing rebuttal of the Section 411(c)(4) presumption. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 15-17.

[11] Therefore, we need not address employer's contentions that the administrative law judge erred in finding that employer failed to disprove the existence of clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 4-14.

— and thus could not establish that no part of claimant's disability was caused by pneumoconiosis. *See Epling*, 783 F.3d at 505-06, 25 BLR at 2-722-23; Employer's Exhibit 6 at 8; Decision and Order at 47. Thus, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by proving that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(ii).

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