U.S. Department of Labor

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

BRB No. 16-0491 BLA

STEVE R. ESKUT Claimant-Respondent v. CONSOL OF KENTUCKY, INCORPORATED and CONSOL ENERGY, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/30/2017 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

John R. Jacobs and J. Thomas Walker (Maples, Tucker & Jacobs, LLC), Birmingham, Alabama, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-05569) of Administrative Law Judge Adele Higgins Odegard, rendered on a subsequent claim filed on May 4, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge credited claimant with at least twenty-four years of underground coal mine employment and found that the evidence was sufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Based on these findings, the administrative law judge determined that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309, and invoked the rebuttable presumption that he is totally disabled due to pneumoconiosis under 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 accordingly.

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, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to employer's appeal.[3]

---

[1] Claimant filed his initial claim for benefits on December 3, 1999, which was denied by the district director on March 20, 2000, because claimant did not establish the existence of pneumoconiosis arising out of coal mine employment or a totally disabling respiratory or pulmonary impairment that was due to pneumoconiosis. Director's Exhibit 1. The record does not show that claimant took any other action on his 2000 claim prior to filing the current subsequent claim.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years in underground coal mine employment, or coal mine employment in conditions substantially similar to those of an underground mine, and a totally disabling respiratory or pulmonary impairment are established. 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 determinations that: Claimant established at least twenty-four years of underground coal mine employment; total disability at 20 C.F.R. §718.204(b)(2); a change in an applicable condition of entitlement at 20 C.F.R. §725.309; and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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, is rational, and is in accordance with applicable law.[4] 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, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[5] 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); *see 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, 1-159 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis, but failed to rebut either the presumed fact of legal pneumoconiosis or the presumed fact of disability causation. Decision and Order at 22-27.

Employer contends that the administrative law judge erred in determining that the opinions of Drs. Goldstein and Hippensteel were insufficient to establish rebuttal of the presumed existence of legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A). Employer also alleges that the administrative law judge applied the incorrect standard on rebuttal of the presumption that claimant has legal pneumoconiosis by requiring "proof of no possible contribution by or 'the absence of any impairment arising out of coal mine employment.'" Employer's Brief at 10, *quoting* Decision and Order at 23. Employer further argues that the administrative law judge's findings as to disability causation at 20 C.F.R. §718.305(d)(1)(ii) are erroneous, as they were based on her flawed determination concerning rebuttal of the presumed existence of legal pneumoconiosis.

---

[4] Because the record reflects that claimant's last coal mine employment was in Kentucky, 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); Decision and Order at 5 n.6; Director's Exhibits 4, 6; Hearing Transcript at 16-17.

[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). 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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

Contrary to employer's contention, the administrative law judge's decision to discredit the opinions of Drs. Goldstein and Hippensteel on the issue of the existence of legal pneumoconiosis is supported by substantial evidence and in accordance with law. Dr. Goldstein examined claimant and reviewed his medical records. Employer's Exhibits 2, 9. He diagnosed chronic obstructive pulmonary disease (COPD) and stated that it is not related to coal dust exposure, based on the improvement in claimant's pulmonary function study results after the administration of bronchodilators. Employer's Exhibit 9 at 41, 42, 50, 52. The administrative law judge permissibly discounted the opinion of Dr. Goldstein because he failed to explain why coal mine dust exposure was not a cause of the residual impairment that remained after bronchodilation. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 25.

Dr. Hippensteel reviewed the medical evidence and diagnosed an obstructive impairment consistent with asthmatic bronchitis. Employer's Exhibits 4, 7, 11. Dr. Hippensteel concluded that coal dust exposure was not a causal factor in claimant's asthmatic bronchitis because this condition developed after claimant left the coal mines. The administrative law judge reasonably determined, however, that Dr. Hippensteel's opinion was entitled to little weight, as his reasoning is inconsistent with the regulations that recognize pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." *Id.*, *quoting* 20 C.F.R. §718.201(c); *see* 65 Fed. Reg. 79,920, 79,937 (Dec. 20, 2000); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 739, 25 BLR 2-675, 2-685-86 (6th Cir. 2014); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc).

Because the administrative law judge provided valid rationales for her credibility determinations, we affirm her decision to accord little weight to the opinions of Drs. Goldstein and Hippensteel on the issue of the presumed existence of legal pneumoconiosis. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-122 (6th Cir. 2000). In light of the administrative law judge's permissible finding that the opinions of Drs. Goldstein and Hippensteel are not adequately reasoned on the source of claimant's totally disabling COPD and asthmatic bronchitis, their opinions could not be credited for the purposes of establishing rebuttal at 20 C.F.R. §718.305(d)(1)(i)(A), regardless of the legal standard the administrative law judge applied. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-245 (4th Cir. 2013); *Morrison*, 644 F.3d at 480, 25 BLR at 2-9. Thus, contrary to employer's assertion, any error by the administrative law judge in applying an incorrect legal standard on the issue of legal pneumoconiosis does not require remand. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We therefore affirm the administrative

law judge's determination that employer failed to rebut the presumed existence of legal pneumoconiosis.[6] *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

Employer also asserts that the administrative law judge erred in finding that it did not rebut the presumed fact of disability causation pursuant to 20 C.F.R. §718.305(d)(1)(ii). We disagree. The administrative law judge permissibly determined that the reasons that undercut the probative value of the opinions of Drs. Goldstein and Hippensteel on the issue of legal pneumoconiosis also undercut the probative value of their opinions that pneumoconiosis did not play any role in claimant's totally disabling respiratory or pulmonary impairment. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 25 BLR 2-453, 2-474 (6th Cir. 2013); Decision and Order at 26-27. Thus, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of claimant's total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii); *Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

---

[6] In light of our holding that the administrative law judge gave permissible reasons for discrediting the opinions of Drs. Goldstein and Hippensteel, we decline to address employer's remaining arguments regarding her consideration of these opinions. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-3 n.4 (1983).

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