U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0370 BLA

ALLEN E. LESTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SPEED MINING, INCORPORATED	)	
	)	
and	)	
	)	
BRICKSTREET MUTUAL	)	DATE ISSUED: 05/16/2018
	)	
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 Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-05229) of Administrative Law Judge Lystra A. Harris 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 miner's subsequent claim filed on January 14, 2013.[1]

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] the administrative law judge credited claimant with 31.26 years of underground coal mine employment and found that the evidence established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). She therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), and established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). She further found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer challenges the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds, urging

[1] Where 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). Claimant's previous claim, filed on February 19, 2010, was denied by the district director on October 5, 2010 because the evidence failed to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. Claimant took no further action on that claim. Consequently, to obtain review on the merits of his current claim, claimant had to submit new evidence establishing this element of entitlement. *See* 20 C.F.R. §725.309(c).

[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 miner worked at least fifteen years in underground coal mine employment, or in coal mine employment in conditions substantially similar to those in an underground mine, and where a totally disabling respiratory or pulmonary impairment is established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.[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 rational, supported by substantial evidence, and 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 and 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 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,[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). The administrative law judge found that employer failed to rebut the presumption by either method.

In order to rebut the presumed existence of legal pneumoconiosis, employer must show that claimant does not suffer from a chronic lung disease or impairment "significantly

[3] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established 31.26 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10, 36-37. Consequently, we further affirm the administrative law judge's findings that claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and invocation of the Section 411(c)(4) presumption. *Id.*

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 11.

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

related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A). Relevant to the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Zaldivar and Basheda.[6] Dr. Zaldivar opined that claimant does not have legal pneumoconiosis, but suffers from "asthma-[chronic obstructive pulmonary disease] overlap" related to cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibit 9 at 11. Dr. Basheda similarly opined that claimant does not have legal pneumoconiosis, but suffers from "tobacco-induced [chronic obstructive pulmonary disease]/asthma." Employer's Exhibit 4 at 24. The administrative law judge found their opinions inadequately explained and, therefore, insufficient to satisfy employer's burden to disprove the existence of legal pneumoconiosis. Decision and Order at 43-50.

Employer initially contends that the administrative law judge mischaracterized Dr. Zaldivar's reliance upon negative chest x-ray evidence in formulating his opinion. We disagree. The administrative law judge acknowledged that Dr. Zaldivar denied relying upon negative chest x-ray evidence to exclude a diagnosis of legal pneumoconiosis.[7] Decision and Order at 22-23, 45-46. However, the administrative law judge further accurately observed that when asked how he was able to exclude coal dust exposure as a cause of claimant's impairment, Dr. Zaldivar testified that "it can be done in several ways beginning with a chest x-ray." Decision and Order at 46, *quoting* Employer's Exhibit 6 at 30. Moreover, the administrative law judge correctly noted that in his supplemental report, Dr. Zaldivar again indicated that negative chest x-rays could be used to eliminate coal mine dust exposure as a cause of claimant's impairment.[8] Decision and Order at 46, *citing*

[6] The administrative law judge also considered the opinions of Drs. Sood, Rasmussen, and Baker, who each diagnosed legal pneumoconiosis. Decision and Order at 48-49; Director's Exhibits 11, 25; Claimant's Exhibits 4, 5, 6. The administrative law judge correctly found that these opinions do not assist employer in disproving the existence of legal pneumoconiosis. Decision and Order at 48-49.

[7] The administrative law judge noted that when Dr. Zaldivar was asked at his deposition whether he was predicating his opinion upon negative x-ray evidence, he "clarified that he was not, and stated that his opinion would be exactly the same if the x-ray [evidence] were positive." Decision and Order at 22, *referencing* Employer's Exhibit 6 at 32.

[8] Dr. Zaldivar listed the various potential causes of claimant's chronic obstructive pulmonary disease (COPD) and stated that "the greatest weight . . . should be given to these factors as a cause of the COPD and asthma as opposed to the single factor of having

Employer's Exhibit 9 at 9. Thus, while noting Dr. Zaldivar's "assertions to the contrary," the administrative law judge permissibly determined that Dr. Zaldivar's "repeated references to [c]laimant's negative x-rays . . . make clear that Dr. Zaldivar place[d] considerable weight on radiographic evidence for the purpose of diagnosing legal pneumoconiosis." Decision and Order at 46. Thus, she permissibly found that Dr. Zaldivar's opinion is inconsistent with the regulations, which recognize that a physician can render a credible diagnosis of pneumoconiosis in the absence of a positive chest x-ray. *See* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311-12, 25 BLR 2-115, 2-125 (4th Cir. 2012); *see also* 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000); Decision and Order at 46.

Further, contrary to employer's argument that Dr. Zaldivar relied on an accurate smoking history, the administrative law judge correctly observed that the physician repeatedly stated that self-reported smoking histories are not reliable and "never specifie[d] . . . what he believe[d] [c]laimant's smoking history actually to be." Decision and Order at 45; *see* Employer's Exhibits 6 at 15-16; 9 at 8. The administrative law judge therefore permissibly found the probative weight of his opinion substantially reduced "[b]ecause it [was] unclear what smoking history Dr. Zaldivar relied on in drawing his conclusion that smoking, but not coal mine employment contributed to [c]laimant's impairment." Decision and Order at 45; *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). As it is supported by substantial evidence, we affirm the administrative law judge's determination that Dr. Zaldivar's opinion is not entitled to probative weight on the issue of legal pneumoconiosis.[9] *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); Decision and Order at 44-46.

Employer next contends that the administrative law judge applied an improper rebuttal standard to Dr. Basheda's opinion by requiring him to "rule out" any contribution from coal mine dust exposure in order to establish that claimant's respiratory impairment is not legal pneumoconiosis. Employer's Brief at 19. We disagree. The administrative law judge correctly stated that employer bore the burden of establishing that claimant does

---

worked in the coal mines without any evidence of dust retention within the lungs by radiographic means." Employer's Exhibit 9 at 9-10.

[9] Because the administrative law judge provided valid bases for discrediting the opinion of Dr. Zaldivar, we need not address employer's remaining arguments regarding the weight she accorded his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

not have legal pneumoconiosis, which includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 37, *see* 20 C.F.R. §§718.201(b), 718.305(d)(1)(i). Moreover, as discussed, *infra*, the administrative law judge did not reject Dr. Basheda's opinion because it is insufficient to meet a "rule out" standard on the existence of legal pneumoconiosis. Rather, the administrative law judge considered the explanations given by Dr. Basheda for why *he* excluded coal mine dust exposure as a causative factor for claimant's impairment, and she found his opinion not credible. Decision and Order at 47-48. Indeed, employer acknowledges in arguing in support of Dr. Basheda's opinion that he "thoroughly explained how he could *rule out* coal mine dust exposure as contributing to [c]laimant's impairment." Employer's Brief at 20 (emphasis added).

Nor is there merit to employer's contention that the administrative law judge failed to provide valid reasons for discrediting Dr. Basheda's opinion. Dr. Basheda attributed claimant's chronic obstructive pulmonary disease (COPD) with superimposed asthma solely to his significant tobacco use. Decision and Order at 47-48; Employer's Exhibit 11 at 33. The administrative law judge permissibly discredited Dr. Basheda's opinion, in part, because he failed to adequately explain why claimant's thirty-one years of coal mine dust exposure could not have contributed to, or aggravated, claimant's pulmonary impairment, along with his other conditions.[10] *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); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-276; Decision and Order 47-48.

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

[10] In excluding coal mine dust as an aggravating factor of claimant's impairment, Dr. Basheda stated that "[a]ny environmental condition, dust or fume, can aggravate asthma." Employer's Exhibit 11 at 49. As the administrative law judge accurately noted, Dr. Basheda did not explain why, if any environmental condition, dust or fume, can exacerbate asthma, it would be "almost impossible for a miner with asthma" to continue to work in the mines without having to be hospitalized, but a smoker with asthma could continue to smoke without being hospitalized. Decision and Order at 47; Employer's Exhibit 11 at 46, 49. Thus, the administrative law judge permissibly observed that Dr. Basheda seems unwilling to even "consider the possibility that coal mine dust may have also played some role." Decision and Order at 47; *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).

diagnoses, and to assign those opinions appropriate weight. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 321, 25 BLR 2-255, 2-260 (4th Cir. 2013); *Looney*, 678 F.3d at 315-16, 25 BLR at 2-130. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp 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 the opinions of Drs. Zaldivar and Basheda, the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis.[11] Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis.[12] 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm 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.

The administrative law judge next addressed whether employer rebutted the Section 411(c)(4) presumption by showing 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); Decision and Order at 50-52. The administrative law judge rationally discounted the opinions of Drs. Zaldivar and Basheda that claimant's disabling pulmonary impairment was not caused by pneumoconiosis because neither doctor diagnosed pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-505, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269-70, 22 BLR 2-372, 2-382-84 (4th Cir. 2002); *Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 51-52. Thus, we affirm the administrative law judge's determination that employer failed to prove that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(ii).

---

[11] We decline to address employer's contentions of error regarding the administrative law judge's consideration of Dr. Sood's opinion diagnosing legal pneumoconiosis. As the administrative law judge noted, his opinion does not assist employer in rebutting the Section 411(c)(4) presumption. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 49.

[12] Consequently, we need not address employer's arguments regarding the administrative law judge's weighing of the evidence relevant to the existence of clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278 (1984); Employer's Brief at 5-10.

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis and employer did not rebut the presumption, we affirm the administrative law judge's finding that claimant established entitlement to benefits.

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