U.S. Department of Labor

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

BRB No. 17-0429 BLA

CALVIN L. THOMPSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PINNACLE MINING COMPANY LLC	)	DATE ISSUED: 05/31/2018
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY	)	
	)	
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 of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

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

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2015-BLA-05525) of Administrative Law Judge Lystra A. Harris awarding benefits 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 claim filed on November 12, 2013.

The administrative law judge found that claimant established at least twenty-two years of underground coal mine employment[1] and a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), and therefore invoked the Section 411(c)(4) presumption.[2] The administrative law judge further found that employer did not rebut the presumption and 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. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[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. 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).

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[1] Claimant's coal mine employment was in Virginia. Director's Exhibit 6. 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).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where claimant establishes fifteen or more 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 impairment. 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 determination that claimant invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis,[4] or that "no part of [his] 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 establish rebuttal by either method.

To prove that claimant does not have legal pneumoconiosis, employer must demonstrate that he does not have a chronic lung disease or impairment that is "significantly 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); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-1-55 n.8 (2015) (Boggs, J., concurring and dissenting). In determining that employer failed to establish that claimant does not have legal pneumoconiosis,[5] the administrative law judge considered the medical opinions of Drs. Zaldivar and Basheda.

Dr. Zaldivar diagnosed claimant with a mild restrictive ventilatory impairment caused by obesity and a May 2008 lung surgery.[6] Director's Exhibit 26. He also diagnosed

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[4] "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).

[5] The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis. Decision and Order at 31.

[6] Dr. Zaldivar testified that claimant had a lobectomy as a result of an infection "that didn't heal." Employer's Exhibit 13 at 9. He noted that this required claimant's right lower lung lobe to be removed, and in order to complete the surgery, surgeons had to open the chest cavity and evacuate blood via a chest tube. *Id*. at 10-11. He explained that blood that remained would cause fibrosis, and if there was enough fibrosis, claimant may have developed restriction of the diaphragm. *Id*. He opined that this surgery resulted in a one-fourth loss of breathing capacity and, further, might have also resulted in some degree of obstruction due to "twisting of the airways." *Id*. Specifically, he explained that as the "remaining lobe expand[ed], there [may have been] distortion of the airways that [caused] some problem with air flow." *Id*. He also testified that claimant had a coronary bypass surgery in 2009 that again required his chest to be opened. *Id*. at 11-12.

an obstructive ventilatory impairment caused by asthma. *Id*. He explained that asthma "by its very nature is variable and obstruction will occur to a greater or lesser degree at different times, depending on how much medication [claimant] is taking, smells in the environment, changes in the weather," and whether claimant is suffering from an upper respiratory infection. *Id*. He also opined that claimant's obstructive impairment and asthma became "more pronounced" after the 2008 surgery. Employer's Exhibit 13 at 10-11, 29. He concluded that these lung impairments were all unrelated to coal mine dust exposure. Director's Exhibit 26.

Dr. Basheda diagnosed "persistent, moderate airway obstruction with mild restrictive lung disease, and a significantly increased diffusion capacity." Employer's Exhibit 5 at 33. He opined that the airway obstruction was "consistent with persistent asthma" that first developed when claimant was a child and recurred through adulthood. *Id*. He indicated that the asthma may be related to secondhand smoke claimant experienced as a child and the use of beta-blockers for cardiac conditions. Employer's Exhibit 12 at 28. He attributed claimant's restrictive impairment to obesity, previous right lower lobe lobectomy, and cardiac bypass surgery. Employer's Exhibit 5 at 35. He opined that claimant's lung impairments were unrelated to coal mine dust exposure. Employer's Exhibit 12 at 25-26.

The administrative law judge accorded the opinions of Drs. Zaldivar and Basheda "minimal weight" because she found that they were not well-reasoned and were "speculative, inconsistent with the regulations, and inconsistent with the evidence of record." Decision and Order at 28-32.[7] *Id.* at 31. For the following reasons, we reject employer's argument that the administrative law judge erred in weighing the opinions of Drs. Zaldivar and Basheda.

As summarized by the administrative law judge, Dr. Zaldivar opined that claimant's restrictive and obstructive impairments were worsened by his May 2008 lung surgery, and

[7] The administrative law judge also considered the opinions of Drs. Al-Jaroushi, Green, and Raj, who attributed claimant's chronic obstructive pulmonary disease to his coal mine dust exposure and, therefore, diagnosed legal pneumoconiosis. Decision and Order at 24, 28. Director's Exhibit 16; Claimant's Exhibits 1, 2. Although the administrative law judge found that their opinions were entitled to "some probative weight" because they were adequately documented, she assigned them "diminished" weight because they did not discuss other contributing factors to claimant's lung disease. Decision and Order at 31. Regardless of the weight the administrative law judge accorded the opinions of Drs. Al-Jourishi, Green, and Raj, they do not support employer's rebuttal burden.

that coal mine dust exposure did not aggravate the impairments, because pulmonary function testing was normal before the surgery. Decision and Order at 29; Employer's Exhibit 13 at 10-13, 19-27, 42. Dr. Zaldivar specifically discussed the results of an October 9, 2007 pulmonary function study that he interpreted as "normal." Employer's Exhibit 13 at 19. However, the administrative law judge noted that treatment notes from New River Breathing Center that pre-date the surgery include two pulmonary function studies that were not interpreted as normal by the reviewing physician. Decision and Order at 12, 29; Claimant's Exhibit 6. Specifically, a pulmonary function study conducted on January 6, 2003 was interpreted as revealing "mild restrictive and mild obstructive ventilatory insufficiency," and a pulmonary function study conducted on April 19, 2007 was interpreted as revealing "mild obstructive ventilatory insufficiency." Claimant's Exhibit 6. Because Dr. Zaldivar did not address those pulmonary function studies in concluding that claimant's pre-surgery pulmonary function was normal, the administrative law judge permissibly found that his opinion was not well-documented and was inconsistent with the evidence of record. *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, 2-275-76 (4th Cir. 1997); Decision and Order at 29.

The administrative law judge also noted that Dr. Zaldivar opined that claimant's asthma was not significantly related to his coal mine dust exposure because claimant did not report any worsening of his symptoms while he was around coal mine dust. Decision and Order at 29; Employer's Exhibit 13 at 44-45. Dr. Zaldivar indicated that if coal mine dust was a trigger for claimant's asthma, then claimant would have had to leave coal mine employment. *Id*. The administrative law judge noted, however, that Dr. Zaldivar's report does not reflect if he asked claimant whether he experienced any exacerbation of his asthma symptoms while working in the coal mines. *Id*. The administrative law judge therefore permissibly found that Dr. Zaldivar's opinion was "speculative," as he did not "adequately explain why coal mine dust did not substantially [contribute to] or aggravate claimant's asthma." Decision and Order at 29; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

With respect to Dr. Basheda, the administrative law judge noted that he excluded a diagnosis of legal pneumoconiosis because coal mine dust exposure does not cause asthma. Decision and Order at 29-30; Employer's Exhibit 12 at 26. However, the administrative law judge noted that the Department of Labor (DOL), in the preamble to the 2001 revised regulations, recognized that chronic obstructive pulmonary disease (COPD) includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema, and asthma. *Id*. at 30, *citing* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). Further, the DOL set forth that COPD may be caused by coal mine dust exposure. 65 Fed. Reg. at 79,939. In light of the medical literature relied upon by the DOL in the preamble, the

administrative law judge permissibly found Dr. Basheda's statement that coal mine dust does not cause asthma to be an unpersuasive explanation for why claimant's asthma was not related to his coal mine dust exposure.[8] *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); Decision and Order at 30.

Additionally, the administrative law judge noted that Dr. Basheda attributed claimant's obstructive impairment to his persistent asthma, because the asthma was untreated for many years, which led to airway remodeling. Decision and Order at 30; Employer's Exhibits 5; 12 at 27-28. Specifically, Dr. Basheda testified that if asthma is not treated early, it becomes irreversible. Employer's Exhibit 12 at 27. Dr. Basheda opined that the untreated asthma resulted in "persistent airway inflammation, remodeling, and persistent airway obstruction documented on the pulmonary function tests." Employer's Exhibit 5 at 34. However, Dr. Basheda also testified that only a minority of asthmatics develop airway remodeling due to untreated asthma. Employer's Exhibit 12 at 31. Contrary to employer's argument, the administrative law judge permissibly found that Dr. Basheda "did not adequately address why in [c]laimant's case, the asthma must have caused lung remodeling causing an obstructive impairment." Decision and Order at 30; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

The administrative law judge also noted that Dr. Basheda attributed claimant's restrictive impairment to his obesity, lung lobectomy, and heart surgery. Decision and Order at 30. She found that Dr. Basheda "did not discuss how [c]laimant's pulmonary function changed since those surgeries or whether [c]laimant's pulmonary function was normal before" the surgeries. *Id.* Contrary to employer's argument, the administrative law

[8] Employer argues that the administrative law judge effectively presumed that asthma is always due to coal mine dust exposure. Employer's Brief at 26-27. This argument mischaracterizes the administrative law judge's references to the preamble. Because claimant invoked the Section 411(c)(4) presumption, employer bore the burden to establish that claimant does not have a "chronic pulmonary disease or respiratory or pulmonary impairment" that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting); 20 C.F.R. §718.201(b). Given the Department of Labor's recognition in the preamble that coal mine dust exposure may cause or contribute to chronic obstructive pulmonary disease, which, in turn, may include asthma, the administrative law judge looked to Dr. Basheda for a sufficient explanation for why claimant's asthma was not significantly related to, or substantially aggravated, by his coal mine dust exposure. Decision and Order at 30.

judge permissibly found that Dr. Basheda did not adequately explain the basis for his conclusions as he "did not address how he determined that [claimant's heart surgery] and lung lobectomy affected his lung function other than note that these surgeries could have an effect." *Id.*; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Substantial evidence supports the administrative law judge's credibility determinations regarding the opinions of Drs. Zaldivar and Basheda, and the Board is not empowered to reweigh the evidence.[9] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). 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 legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether employer rebutted the Section 411(c)(4) presumption 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). She rationally discounted the opinions of Drs. Zaldivar and Basheda that claimant's disability is not due to pneumoconiosis because neither doctor diagnosed legal pneumoconiosis, contrary to her finding that employer failed to disprove that claimant has the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 32-33. Therefore, we 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).

[9] We decline to address employer's contentions of error regarding the administrative law judge's consideration of the opinions of Drs. Al-Jaroushi, Green, and Raj, as their opinions do not assist employer in establishing that claimant does not have legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (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