U.S. Department of Labor

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

BRB No. 18-0297 BLA

BILLY RAY OSBORNE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BUFFALO MINING COMPANY	)	
	)	
and	)	
	)	
PITTSTON COMPANY	)	DATE ISSUED: 05/14/2019
	)	
Employer/Carrier-Respondents	)	
	)	
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.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2016-BLA-05998) of Administrative Law Judge Lystra A. Harris awarding benefits on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on August 5, 2014.[1]

After crediting claimant with 22.5 years of underground coal mine employment,[2] the administrative law judge found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). She therefore found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge further found that employer did not rebut the presumption and awarded benefits.

On appeal, employer contends the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Neither claimant or the Director, Office of Workers' Compensation Programs, has filed a response brief.[4]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated

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[1] Claimant's prior claim, filed on March 17, 1993, was finally denied by the district director on September 3, 1993 because claimant did not establish any element of entitlement. Director's Exhibit 1.

[2] The record reflects that claimant's coal mine employment was in West Virginia. Hearing Transcript at 13. 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 where the evidence establishes at least fifteen 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] Because employer does not challenge the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, or her finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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 establish that claimant has neither legal nor clinical pneumoconiosis,[5] 20 C.F.R. §718.305(d)(1)(i), 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)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

To establish that claimant does not have legal pneumoconiosis, employer must demonstrate claimant 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, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). In evaluating whether employer met its burden, the administrative law judge considered the opinions of Drs. Zaldivar and Castle, both of whom opined that claimant does not have legal pneumoconiosis.[6] Dr. Zaldivar opined that claimant has an obstructive pulmonary impairment due to asthma caused by smoking. Director's Exhibit 14; Employer's Exhibit 4 at 57. Dr. Zaldivar further opined that emphysema caused by cigarette smoking could also be contributing to claimant's impairment. *Id.* Dr. Castle opined that claimant suffers from a "tobacco induced airway obstruction with an asthmatic

[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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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).

[6] The administrative law judge also considered the opinions of Drs. Rasmussen and Forehand. Decision and Order at 13-15. Dr. Rasmussen diagnosed legal pneumoconiosis, in the form of an "interstitial type lung disease caused in part by coal mine dust exposure." Director's Exhibit 14. Dr. Forehand opined that claimant's "prolonged coal mine dust exposure was not insignificant" in the development of his obstructive lung disease. Director's Exhibit 15.

component . . . ." Employer's Exhibit 3 at 12.

The administrative law judge accurately found that Dr. Zaldivar relied, in part, on the absence of radiographic evidence of pneumoconiosis in opining that claimant's pulmonary condition was not related to his coal mine dust exposure. Decision and Order at 28. The administrative law judge permissibly found this reasoning to be inconsistent with the definition of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311-12 (4th Cir. 2012); *see also* 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000) (recognizing that coal mine dust can cause clinically significant obstructive lung disease, even in the absence of x-ray evidence of clinical pneumoconiosis).

The administrative law judge also correctly noted Dr. Castle eliminated coal mine dust exposure as a source of claimant's obstructive pulmonary disease, in part, because he found a reduction in claimant's FEV1/FVC ratio which, he maintained, was inconsistent with obstruction due to coal mine dust exposure.[7] Decision and Order at 28-29; Employer's Exhibit 3. The administrative law judge discredited his opinion because he found that reasoning conflicts with the medical science accepted by the Department of Labor that coal mine dust exposure can cause clinically significant obstructive disease that can be shown by a reduction in the FEV1/FVC ratio. The United States Court of Appeals for the Fourth Circuit has held that this is a proper basis to discredit a physician's opinion. *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *see also* 65 Fed. Reg. at 79,943; *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014).

The administrative law judge also permissibly discredited the opinions of Drs. Zaldivar and Castle because she found that neither doctor adequately explained how they eliminated claimant's 22.5 years of coal mine dust exposure as a significant contributor to claimant's chronic obstructive lung disease. The administrative law judge specifically found that "[n]either physician provided a rationale as to why coal dust-induced lung disease and tobacco smoke-induced lung disease are mutually exclusive diagnoses . . . ." Decision and Order at 29, *citing* 65 Fed. Reg. at 79,943; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013) (affirming an administrative law judge's discrediting of opinions which she determined provided inadequate and unconvincing reasons for eliminating coal mine dust exposure as a cause of a miner's interstitial fibrosis);

[7] Dr. Castle opined that when coal mine dust exposure causes obstruction, it generally causes a "parallel" reduction in the FEV1 and FVC values. Employer's Exhibit 3 at 11. Dr. Castle attributed claimant's obstructive pulmonary impairment to smoking and not coal mine dust exposure because "the FVC and FEV1 [values] showed a markedly disparate reduction." *Id.*

Looney, 678 F.3d at 313-14.

Because the administrative law judge permissibly discredited the opinions of Drs. Zaldivar and Castle,[8] we affirm her finding that employer failed to establish that claimant does not have legal pneumoconiosis, precluding a rebuttal finding that claimant does not have pneumoconiosis.[9] *See* 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 [claimant'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 Castle that claimant's disability is not due to pneumoconiosis because neither doctor diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013). Therefore, 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. *See* 20 C.F.R. §718.305(d)(1)(ii).

[8] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Zaldivar and Castle, any error in discrediting their opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to their opinions.

[9] In light of our affirmance of the administrative law judge's finding that employer did not establish that claimant does not have legal pneumoconiosis, we need not address its challenges to her determination that employer also failed to establish that claimant does not have clinical pneumoconiosis. *See 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.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge