U.S. Department of Labor

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

BRB No. 15-0049 BLA

CLARENCE L. LESTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 11/03/2015
	)	
Employer-Petitioner	)	
	)	
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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-05484) of Administrative Law Judge Scott R. Morris rendered on a subsequent claim filed on

April 24, 2012, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (the Act).[1] The administrative law judge found that claimant established 19.12 years of underground coal mine employment. In addition, the administrative law judge determined that claimant established a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(i), (iv), based on the newly submitted evidence. Therefore, the administrative law judge concluded that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c)[2] and is entitled to the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer asserts that the administrative law judge erred in finding that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the rebuttable presumption pursuant to amended Section 411(c)(4). In addition, employer argues that the administrative law judge applied an improper standard on rebuttal and erred in determining that it failed to rebut the presumption. Claimant has not filed a response

[1] Claimant filed an initial claim for benefits on June 1, 1982, which was denied by the district director on February 9, 1983, as claimant did not establish the existence of pneumoconiosis arising out of coal mine employment or a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. Director's Exhibit 1. Claimant filed his second claim for benefits on June 23, 1986, which was denied by the district director on December 12, 1986, on the grounds that claimant did not establish any element of entitlement. Director's Exhibit 2. Claimant filed his third claim for benefits on January 18, 1991, which was ultimately dismissed by Associate Chief Administrative Law Judge James Guill because claimant did not comply with the February 14, 1992 Order to Compel, requiring claimant to attend a physical examination by employer's physician and to answer all of employer's interrogatories or show cause why he is not able to do so. Director's Exhibit 3. Claimant did not take any further action until he filed the present subsequent claim.

[2] The Department of Labor revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language previously set forth in 20 C.F.R. §725.309(d) is now set forth in 20 C.F.R. §725.309(c).

[3] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she worked at least fifteen years in underground coal mine employment, or surface coal mine employment in conditions substantially similar to those in an underground mine, and also suffers from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), filed a limited brief, alleging that employer's contention, that total disability is not established if the respiratory impairment is due to non-pulmonary causes, is without merit. In addition, the Director asserts that the administrative law judge applied the proper rebuttal standard and that he acted within his discretion in discrediting the medical opinions of Drs. Zaldivar and Castle on rebuttal.[4]

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, rational, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

I. Invocation of the Amended Section 411(c)(4) Presumption – 20 C.F.R. §718.204(b)

In this case involving a subsequent claim, the issue of total respiratory or pulmonary disability is relevant to invoking the amended Section 411(c)(4) presumption, and establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[6] The regulations provide that a miner shall be considered totally disabled if his respiratory or pulmonary impairment, standing alone, prevents him from performing his

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established 19.12 years of underground coal mine employment. Decision and Order at 7-8; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibits 1-3, 8-9. 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).

[6] When 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). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because claimant's prior claim was denied for failure to establish any element of entitlement, claimant had to establish, based on the newly submitted evidence, at least one element in order to obtain review of his claim. 20 C.F.R. §725.309(c)(2), (3); *White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004).

usual coal mine work, and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: 1) pulmonary function studies showing values equal to or less than those listed in Appendix B to 20 C.F.R Part 718; or 2) arterial blood gas studies showing values equal to or less than those listed in Appendix C of 20 C.F.R. Part 718; or 3) the miner has pneumoconiosis and is shown by the evidence to suffer from cor pulmonale with right-sided congestive heart failure; or 4) where total disability cannot be established by the preceding methods, a physician exercising reasoned medical judgment concludes that a miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv).

The administrative law judge determined that claimant established total disability, based on the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i), but did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii)-(iii), as the preponderance of blood gas studies, including the most recent one, was non-qualifying,[7] and there was no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 9-12. At 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Forehand, Zaldivar and Castle. *Id*. at 12-21. The administrative law judge found that all of the physicians agreed that claimant does not have the respiratory capacity to perform his previous coal mine employment and, therefore, determined that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 21.

Employer contends that Drs. Zaldivar and Castle determined that claimant is not totally disabled by a respiratory or pulmonary impairment, as Dr. Zaldivar attributed claimant's impairment to his obesity, and Dr. Castle found claimant totally disabled as a whole person due to morbid obesity, coronary artery disease, hypertensive cardiovascular disease, and other medical conditions unrelated to coal dust exposure. Employer also argues that the administrative law judge erred in giving weight to Dr. Forehand's opinion, that claimant is totally disabled, as Dr. Forehand relied on a qualifying blood gas study, which was inconsistent with the administrative law judge's finding that claimant did not establish total disability based on the blood gas studies and, unlike Drs. Zaldivar and Castle, Dr. Forehand did not perform lung volume or diffusion capacity testing. In addition, employer asserts that Dr. Forehand's opinion was based, in part, on his previous examination of claimant in July 2011, which was not admitted into evidence.

[7] A pulmonary function study or blood gas study that yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B, C, is considered "qualifying." A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Contrary to employer's contention, Drs. Zaldivar and Castle diagnosed a totally disabling respiratory impairment, but found that the impairment was due to something other than coal dust exposure. In his report, dated May 22, 2013, Dr. Zaldivar indicated that claimant "does not have the *respiratory capacity* to perform his usual coal mining work nor any type of work above the sedentary level due to all of the above problems none of which are related to his occupation." Employer's Exhibit 6 (emphasis added). In addition, at his deposition on March 24, 2014, Dr. Zaldivar testified that "from the *respiratory standpoint*, meaning the capacity to breathe, he cannot do any work." Employer's Exhibit 12 at 22 (emphasis added). At Dr. Castle's deposition on March 27, 2014, he testified that, "[e]ven though I think that *his physiologic studies would be disabling*, that abnormality is not related to [coal workers' pneumoconiosis]." Employer's Exhibit 13 at 28 (emphasis added). Additionally, in response to a question as to whether claimant's pulmonary function studies showed a disabling respiratory impairment, Dr. Castle responded: "[y]es, I believe that they do. And I believe that [claimant] would be disabled as a whole man related to morbid obesity, which has caused his primary physiological abnormality." *Id*. at 22.

Based on these statements, the administrative law judge acted within his discretion as fact-finder in determining that Drs. Zaldivar and Castle diagnosed a totally disabling respiratory impairment. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Therefore, we reject employer's assertion that total respiratory disability is not established because claimant's impairment is due to non-respiratory causes. The etiology of claimant's respiratory impairment concerns the issue of total disability causation, which is not relevant to invocation of the amended Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(3); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137-40, BLR (4th Cir. 2015). Consequently, we affirm the administrative law judge's finding that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)[8] and, therefore, established a change in an

[8] We also decline to address the substance of employer's argument that the administrative law judge erred in crediting Dr. Forehand's opinion that claimant has a totally disabling respiratory impairment. In light of our affirmance of the administrative law judge's determination that the remaining physicians of record diagnosed claimant with a totally disabling respiratory impairment, the discrediting of Dr. Forehand's opinion containing the same conclusion would not constitute grounds for vacating the administrative law judge's total disability finding. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

applicable condition of entitlement at 20 C.F.R. §725.309, and entitlement to the rebuttable presumption at amended Section 411(c)(4).[9]

II. Rebuttal of the Amended Section 411(c)(4) Presumption – 20 C.F.R. §718.305(d)(1)

A. Application of the Rebuttal Methods to Responsible Operators

Once the administrative law judge determines that claimant has invoked the presumption that he is totally disabled due to pneumoconiosis at amended Section 411(c)(4), the Act and its implementing regulations shift the burden to employer to affirmatively establish that claimant does not have legal and clinical pneumoconiosis, or that no part of his total respiratory or pulmonary disability is caused by pneumoconiosis as defined in 20 C.F.R. §718.201. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1); *see Bender*, 782 F.3d at 134-35; *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995).

Employer argues, "the limitations on rebuttal evidence in amended [Section] 921(c)(4) apply only to claims against the Secretary of Labor pursuant to *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 35 (1976). Therefore, neither the 'rule out' nor the comparable 'no part' standard is applicable to operators." Employer's Brief at 20 n.8. Employer acknowledges that the Board previously rejected this argument in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd sub nom. Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 25 BLR 2-339 (4th Cir. 2013) (Niemeyer, J., concurring), but states that the United States Court of Appeals for the Fourth Circuit did not reach this issue because the court found the rule out standard was not applied to the operator in that

[9] We also reject employer's argument that the administrative law judge erred in determining that the pulmonary function studies support a finding of total disability under 20 C.F.R. §718.204(b)(2)(i). Employer maintains that the administrative law judge did not determine whether each pair of FEV1 and FVC results produced a qualifying study and did not adequately address the fact that three of the six individual studies were invalidated by Drs. Renn, Zaldivar and Castle. We reject employer's contentions, as the administrative law judge ultimately based his finding, that claimant established total disability under 20 C.F.R. §718.204(b)(2), on his rational determination that all of the physicians – even those who questioned the validity of claimant's pulmonary function studies – concluded that he has a totally disabling respiratory impairment. Therefore, error, if any, in the administrative law judge's consideration of the pulmonary function study evidence under 20 C.F.R. §718.204(b)(2)(i) is harmless. *See Larioni*, 6 BLR at 1-1278.

claim. Employer maintains that 20 C.F.R. §718.305 "is invalid because an agency lacks power to re-interpret a statute in a way contrary to a court's prior interpretation when the court has viewed the statute as unambiguous and left no room for agency discretion in interpretation." *Id*. at 21. Therefore, employer contends that the administrative law judge erred in relying on 20 C.F.R. §718.305.

We reject employer's arguments. The Fourth Circuit, within whose jurisdiction this case arises, held that the regulation at 20 C.F.R. §718.305 does not conflict with the *Usery* decision, but constitutes a reasonable exercise of agency authority applicable to any party opposing entitlement, including coal mine operators. *Bender*, 782 F.3d at 137-40; *see also Minich v. Keystone Coal Mining Corp.*, BRB No. 13-0544 BLA, BLR (Apr. 21, 2015) (Boggs, J., concurring and dissenting) (holding that, in order to rebut the presumed fact of disability causation at 20 C.F.R. §718.305(d)(1)(ii), the party opposing entitlement must affirmatively establish, with credible proof, that no part, not even an insignificant part, of the miner's pulmonary or respiratory disability was caused by either legal or clinical pneumoconiosis). In addition, because *Bender* was issued subsequent to the court's decision in *Owens*, employer's reliance on *Owens* is unavailing.

B. Rebuttal of the Presumed Existence of Legal Pneumoconiosis

The administrative law judge found that the opinions of Drs. Zaldivar and Castle, that claimant does not have legal pneumoconiosis, are not well reasoned as they failed to adequately explain why coal dust exposure could not have contributed to claimant's respiratory impairment. Decision and Order at 30-33; Employer's Exhibits 6, 11-13. Employer, however, contends that the administrative law judge erred in giving less weight to their opinions. Contrary to employer's contentions, the administrative law judge's findings are supported by substantial evidence. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Hicks*, 138 F.3d at 528, 21 BLR at 2-326.

Specifically, the administrative law judge acted within his discretion in giving Dr. Zaldivar's opinion less weight because he focused on how claimant's obesity kept his lungs from expanding, but did not adequately explain why damage to the lungs themselves from coal dust inhalation was excluded as a contributing cause of claimant's respiratory impairment.[10] *See Westmoreland Coal Co. v. Amick*, 289 F.App'x. 638, 639

[10] When asked why he excluded legal pneumoconiosis as a potential cause of claimant's respiratory impairment, Dr. Zaldivar testified:

> There are far more logical explanations. The history of asthma can account for some of the obstruction . . . . But obesity is causing everything else.

(4th Cir. 2008); Decision and Order at 31. Additionally, the administrative law judge rationally found that Dr. Zaldivar did not sufficiently explain why coal dust exposure did not also contribute to claimant's restrictive impairment, given that legal pneumoconiosis includes "any chronic *restrictive* or obstructive disease arising out of coal mine employment." [11] Decision and Order at 31, *quoting* 20 C.F.R. §718.201(a)(2) (emphasis added); *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012). The administrative law judge also acted within his discretion in giving less weight to Dr. Castle's opinion, as he rationally found that Dr. Castle did not explain his basis for concluding that coal dust exposure did not also contribute to claimant's respiratory impairment, especially when he noted that claimant worked in or around an underground coal mine for a sufficient amount of time to have developed pneumoconiosis.[12] *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; Decision and Order at 32-33.

> Then when you add the cardiac disease with fluid retention, the renal disease with fluid retention, then all of it [is a] more logical explanation[] than simply saying that there's nothing in the x-ray, but simply because he had worked in the coal mines, some of his problem must be related to the coal mines.

Employer's Exhibit 12 at 37-38.

[11] In his report, dated May 22, 2013, Dr. Zaldivar found that "the only abnormality is one of restriction which goes along with the obesity." Employer's Exhibit 6. At his deposition on March 24, 2014, Dr. Zaldivar attributed claimant's restrictive respiratory impairment to "[o]besity and cardiac failure with fluid retention, renal failure with fluid retention." Employer's Exhibit 12 at 35.

[12] In his report, dated February 19, 2014, Dr. Castle found that claimant "certainly worked in or around the underground mining industry for a sufficient enough time to have developed coal workers' pneumoconiosis." Employer's Exhibit 11. Dr. Castle concluded that:

> [Claimant] does not have legal pneumoconiosis because the physiologic changes present are due to his morbid obesity and other medical problems including coronary artery disease and a minimal degree of tobacco smoke induced airway obstruction. The arterial blood gas abnormalities are indicative of cardiac and hypertensive cardiovascular disease with diastolic dysfunction as well as his obesity.

Id. At his deposition on March 27, 2014, Dr. Castle reiterated that he "believe[d] that the physiologic abnormalities, primarily restrictive lung disease with very mild obstruction,

Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Zaldivar and Castle, the only physicians who found that claimant does not have legal pneumoconiosis, and employer bears the burden of rebutting the presumption, we need not address employer's remaining arguments concerning these physicians' opinions or Dr. Forehand's contrary opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009). Therefore, we affirm the administrative law judge's finding that employer did not rebut the presumed existence of legal pneumoconiosis.[13] 20 C.F.R. §718.305(d)(1)(i); *see Bender*, 782 F.3d at 134-35; *Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Blakley*, 54 F.3d at 1320, 19 BLR at 2-203.

C. Rebuttal of the Presumed Fact of Total Disability Causation

The administrative law judge noted that he had determined, "due to the operation of [20 C.F.R.] §718.305, that [claimant's] totally disabling respiratory impairment is due to pneumoconiosis." Decision and Order at 37. Additionally, the administrative law judge stated that the evidence was sufficient to support a finding that coal dust exposure contributed to claimant's respiratory impairment. *Id*. Consequently, the administrative law judge determined that "[t]he Employer cannot establish that no part of the Claimant's disability was caused by pneumoconiosis . . . ." *Id*.

Employer contends that "[a]ll of the medical evidence relevant to the question of disability causation must be weighed together, with the Claimant bearing the burden of establishing total disability by a preponderance of the evidence." Employer's Brief at 38-39. Employer asserts that "[t]he assessments of Drs. Zaldivar and Castle represent a preponderance of the objective evidence . . . establishing the Claimant does not have a disabling pulmonary or respiratory impairment . . . . Such a finding is sufficient to establish the miner does not have a totally disabling pulmonary impairment due to pneumoconiosis . . . ." *Id*. at 39.

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is due to [claimant's] morbid obesity and his former tobacco smoking habit, rather than [coal workers' pneumoconiosis]." Employer's Exhibit 13 at 27.

[13] The administrative law judge determined that employer rebutted the presumed existence of clinical pneumoconiosis, based on the medical opinions of Drs. Zaldivar and Castle. Decision and Order at 29. The administrative law judge gave less weight to Dr. Forehand's opinion, that claimant has clinical pneumoconiosis, as he relied on a positive x-ray interpretation, which was contrary to the administrative law judge's finding that the weight of the x-ray evidence is negative for pneumoconiosis. *Id*.

Contrary to employer's contention, the issues of total disability and total disability causation are considered separately under 20 C.F.R. §718.204. In addition, under the amended Section 411(c)(4) presumption, employer bears the burden of "[e]stablishing 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 Bender*, 782 F.3d at 134-35; *Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Blakley*, 54 F.3d at 1320, 19 BLR at 2-203. Employer's allegations of error fail, therefore, because we have affirmed the administrative law judge's conclusion that the opinions of Drs. Zaldivar and Castle support a finding that claimant established total respiratory disability at 20 C.F.R. §718.204(b)(2). Furthermore, our affirmance of the administrative law judge's determination that the opinions of employer's experts are insufficient to rebut the presumed existence of legal pneumoconiosis, precludes a finding that their opinions are sufficient to establish that no part of claimant's total respiratory disability is due to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Bender*, 782 F.3d at 143; *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-474 (6th Cir. 2013). Employer does not raise any other arguments concerning total disability causation. Consequently, we affirm the administrative law judge's finding that employer did not rebut the presumed fact of total disability causation under 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge