U.S. Department of Labor

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

BRB No. 15-0073 BLA

WILLIAM C. ESTES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KENTUCKY PROCESSING COMPANY, INCORPORATED/ADENA FUELS	)	DATE ISSUED: 11/23/2015
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order Awarding Benefits of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

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

Tighe Estes (Fogle Keller Purdy, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-5193) of Administrative Law Judge Peter B. Silvain, Jr., rendered on a claim filed on December 7, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that claimant established twenty years of surface coal mine employment, and determined that all of claimant's coal mine work was in conditions that were substantially similar to those in an underground mine. Based on that finding, the filing date of the claim, and his determination that claimant established total disability at 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] The administrative law judge further found that employer did not establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption, based on the opinions of Drs. Broudy and Westerfield. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response unless specifically requested to do so by the Board.[2]

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,

[1] Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen 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 or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty years of qualifying coal mine employment, a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2), and invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4-5, 22-24.

and in accordance with applicable law.[3] 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).

In order to rebut the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis, employer must affirmatively establish that claimant does not have either legal[4] or clinical[5] pneumoconiosis, or that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §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*., BRB No. 13-0544 BLA, slip op. at 10-11 (Apr. 21, 2015) (Boggs, J., concurring and dissenting). The administrative law judge determined that employer disproved the existence of clinical pneumoconiosis by a preponderance of the x-ray and medical opinion evidence. Decision and Order at 26, 31. With regard to the existence of legal pneumoconiosis, the administrative law judge rejected the opinions of employer's physicians, Drs. Broudy and Westerfield, that claimant has a totally disabling obstructive

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[4] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The regulation also provides that "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[5] Pursuant to 20 C.F.R. §718.201(a)(1), clinical pneumoconiosis is defined as:

> [T]hose diseases recognized by the medical community as pneumoconiosis, *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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

respiratory impairment caused by smoking and asthma, with no significant contribution from claimant's twenty years of coal dust exposure. *Id*. at 27-33. Based on his determinations that the opinions of Drs. Broudy and Westerfield were not well-reasoned, the administrative law judge concluded that employer failed to affirmatively establish that claimant does not suffer from legal pneumoconiosis and claimant's total disability is unrelated to his legal pneumoconiosis. *Id*.

Employer argues that the administrative law judge mischaracterized Dr. Broudy's testimony and did not adequately explain why his opinion fails to disprove the existence of legal pneumoconiosis. We disagree. After summarizing Dr. Broudy's August 26, 2010 medical report and his August 26, 2011 deposition testimony, Decision and Order at 17-18, the administrative law judge found that one of Dr. Broudy's reasons for excluding coal dust exposure as a contributing factor to claimant's chronic obstructive pulmonary disease (COPD) was claimant's "responsiveness to bronchodilators" during the pulmonary function testing, because Dr. Broudy "believes that coal dust generally causes a fixed impairment." Decision and Order at 30; *see* Director's Exhibit 13. The administrative law judge observed correctly that claimant's "obstruction was only partially reversible, as the results did not return to normal after the administration of bronchodilators." Decision and Order at 30. Contrary to employer's contention, the administrative law judge specifically considered Dr. Broudy's opinion that the irreversible aspect of claimant's impairment was "typical of impairment due to smoking." Employer's Exhibit 1 at 13; *see* Decision and Order at 17. However, the administrative law judge permissibly concluded that Dr. Broudy failed to "adequately address" why the irreversible component of the obstruction was not also due to coal dust exposure. Decision and Order at 30; *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-451 (6th Cir. 2013); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. Appx. 227, 237 (4th Cir. May 11, 2004) (unpub.).

In addition, the administrative law judge permissibly discounted Dr. Broudy's opinion because his rationale for eliminating coal mine dust exposure as a contributing factor to claimant's obstructive impairment was in conflict with the medical science accepted by the Department of Labor (DOL), which "has specifically found that coal dust exposure may cause [COPD], with associated decrements in FEV1 and the FEV1/FVC ratio." Decision and Order at 30; *see Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000) (explaining that "coal miners have an increased risk of developing COPD. COPD may be detected from decrements in certain measures of lung function, especially FEV1 and the ratio of FEV1/FVC."). Specifically,

Dr. Broudy eliminated coal dust exposure as a contributing factor to claimant's obstructive pulmonary impairment, in part, because he found a disproportionate decrease in claimant's FEV1 compared to his FVC, a pattern that he indicated was uncharacteristic of a coal mine dust-induced lung disease.[6] Director's Exhibit 13; Employer's Exhibit 1.

With respect to Dr. Westerfield's opinion, the administrative law judge found that he excluded coal dust exposure as a contributing factor in claimant's obstructive impairment, in part, based on his view that "[c]laimant's coal dust exposure was limited." Decision and Order at 31. Specifically, Dr. Westerfield stated that "the coal preparation plant [where claimant worked] would be one of the safer places to work in terms of developing pneumoconiosis or mineral dust induced COPD." Employer's Exhibit 2 at 19. Although employer asserts that Dr. Westerfield's explanation is credible, given his generalized knowledge of dust conditions in coal preparation plants and his review of the job descriptions given by claimant, the administrative law judge acted within his discretion in rejecting Dr. Westerfield's opinion on the ground that he did not have actual knowledge of the dust conditions experienced by claimant.[7] *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). The administrative law judge also permissibly rejected Dr. Westerfield's rationale because it was contrary to the administrative law judge's own finding "that [claimant's] exposure to coal dust in the necessarily above-ground coal preparation plant was substantially similar to that of an underground mine." Decision and Order at 31; *see Ogle*, 737 F.3d at 1072-73, 25 BLR at

[6] Employer argues that the administrative law judge mischaracterized Dr. Broudy's rationale for excluding legal pneumoconiosis. We disagree. In his August 26, 2010 report, Dr. Broudy stated that claimant's pre-bronchodilator FEV1/FVC ratio was fifty percent. Director's Exhibit 13. At his August 26, 2011 deposition, when asked how he ruled out coal dust exposure as a causative factor in claimant's chronic obstructive pulmonary impairment, Dr. Broudy explained that "usually, with coal dust exposure, there's a parallel reduction in the FEV1 *and* FVC." Employer's Exhibit 1 at 13 (emphasis added). The administrative law judge rationally found that "it would not make sense for the regulations to allow a claimant to establish total disability due to pneumoconiosis by showing a reduced FEV1 *or* FEV1/FVC ratio were Dr. Broudy correct in his view." Decision and Order at 30 (emphasis added); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012).

[7] Contrary to employer's argument, although Dr. Westerfield reviewed claimant's job duties, the administrative law judge accurately noted that, when asked how he concluded that claimant had only "limited" exposure in his coal mine job, Dr. Westerfield explained that he based his opinion on general medical literature and not actual statements from claimant. Decision and Order at 31; *see* Employer's Exhibit 2 at 30-31.

2-446-47; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989).

Furthermore, contrary to employer's argument, the administrative law judge reasonably found that Dr. Westerfield's views are "inconsistent with the [DOL]'s determination that pneumoconiosis is a 'latent and progressive disease' that 'may first become detectable only after cessation of coal mine dust exposure.'" Decision and Order at 31, *quoting* 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003). Dr. Westerfield opined that claimant did not have legal pneumoconiosis because his "coal dust exposure was remote" and "was [thirteen] years ago." Employer's Exhibit 2 at 19. Although Dr. Westerfield acknowledged that pneumoconiosis is a progressive condition, he nonetheless explained that "it would not be reasonable to attribute [a respiratory problem] to the coal dust exposure" years after cessation of the exposure. *Id*. at 20.

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 diagnoses, and assign those opinions appropriate weight. *Ogle*, 737 F.3d at 1072-73, 25 BLR at 2-446-47; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002). 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 (1988). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to prove that claimant does not have legal pneumoconiosis and is unable to rebut the amended Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).[8]

Furthermore, based on the administrative law judge's determination that the opinions of Drs. Broudy and Westerfield are not adequately reasoned as to the etiology of claimant's disabling obstructive respiratory impairment, he rationally found that they also

[8] Because the administrative law judge provided a valid basis for rejecting Dr. Broudy's opinion, it is not necessary that we address employer's additional argument, that the administrative law judge erred in rejecting Dr. Broudy's opinion based on the length of claimant's smoking history. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

failed to affirmatively establish that no part of claimant's respiratory or pulmonary disability is due to pneumoconiosis as defined in 20 C.F.R. §718.201. *See Ogle*, 737 F.3d at 1074, 25 BLR at 2-451-52; *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-474 (6th Cir. 2013). Thus, we affirm the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption, pursuant to 20 C.F.R. §718.305(d)(1)(ii), by establishing that no part of claimant's respiratory disability is due to pneumoconiosis. Decision and Order at 32-33.

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