U.S. Department of Labor

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

BRB No. 17-0656 BLA

RONNIE A. STIDHAM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 11/26/2018
	)	
WESTMORELAND COAL COMPANY c/o HEALTHSMART CASUALTY CLAIM	)	
	)	
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 Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Paul E. Frampton and Fazal A. Shere (Bowles Rice LLP), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2015-BLA-5639) of Administrative Law Judge Alan L. Bergstrom 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 April 18, 2014.[1]

The administrative law judge found that claimant had twenty-two years and three months of underground coal mine employment and is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). He therefore found that claimant 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),[2] and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).[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 it did not rebut the Section 411(c)(4) presumption. Neither claimant, nor the Director, Office of Workers' Compensation Programs, filed a response brief in this appeal.[4]

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[1] This is claimant's second claim. Director's Exhibit 3. His first claim, filed on August 27, 1996, was denied by the district director on November 6, 1996 because the evidence did not establish any element of entitlement. Director's Exhibit 1 at 1, 6. Claimant took no further action on that claim.

[2] Under Section 411(c)(4) of the Act, 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) (2012); *see* 20 C.F.R. §718.305.

[3] 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).

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-two years and three months of underground coal mine employment; the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §7218.204(b)(2); invocation of the Section 411(c)(4*)* presumption; and a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710, 1-711 (1983); Decision and Order at 17, 22.

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.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & 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 establish that he has neither legal nor clinical pneumoconiosis,[6] 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). The administrative law judge considered the opinions of Drs. Ajjarapu, Rosenberg, and Zaldivar. Dr. Ajjarapu diagnosed legal pneumoconiosis in the form of chronic bronchitis, which she opined is due to coal mine dust exposure and cigarette smoking, with a greater contribution from coal mine dust.[7] Director's Exhibit 11. In contrast, Drs. Rosenberg and Zaldivar opined that claimant does not have legal

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[6] "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).

[7] In diagnosing chronic bronchitis due to coal dust exposure, Dr. Ajjarapu explained that coal dust particles "are embedded in the parenchyma of airway tissues, which continue to exert and cause mucous production even after years of exposure and this is a known mechanism of inflammatory response." Director's Exhibit 18.

pneumoconiosis, but suffers from asthma that developed into chronic obstructive pulmonary disease (COPD) with chronic bronchitis, unrelated to coal mine dust exposure. *See* Director's Exhibit 12 at 4-5; Employer's Exhibits 2 at 4; 3 at 7, 11-13, 15-16; 4 at 20, 25, 28. The administrative law judge discredited the opinions of Drs. Rosenberg and Zaldivar as contrary to the regulations and, therefore, found that employer failed to disprove that claimant has legal pneumoconiosis pursuant to 20 C.F.R. 718.305(d)(1)(i). Decision and Order at 25-26.

We reject employer's contention that the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Zaldivar. Employer's Brief at 9-13. The administrative law judge accurately noted that Drs. Rosenberg and Zaldivar opined that claimant's chronic bronchitis could not be attributed to coal dust exposure because chronic bronchitis dissipates within months of the cessation of exposure to coal mine dust.[8] Decision and Order at 25; Director's Exhibit 12; Employer's Exhibits 2, 3, 4. The administrative law judge permissibly found their opinions to be unpersuasive, however, in light of the regulation at 20 C.F.R. §718.201(c), which recognizes pneumoconiosis as a latent and progressive disease that "may first become detectable only after cessation of coal mine dust exposure."[9] Decision and Order at 25, *citing* 20 C.F.R. §718.201(c); *see Mullins*

[8] Dr. Rosenberg stated: "[I]t should be noted that any bronchitis [claimant] complained of does not relate to coal mine dust exposure which ceased years ago. . . . [I]f coal dust's irritant effect is no longer occurring because coal dust exposure has ceased, it is only logical that the associated cough and sputum production will no longer be occurring. Hence, remote exposures are not aggravating factors for current bronchitic symptoms. Specific to [claimant], coal mine dust exposures ending in 1995 are not causing aggravation of bronchitis in 2014." Director's Exhibit 12 at 8-9. Dr. Zaldivar stated: "The bronchitis which [claimant] has is not industrial bronchitis. It is due to asthma. As noted by Dr. Rosenberg, industrial bronchitis . . . resolves once the individual leaves the dusty area." Employer's Exhibit 2 at 4.

[9] We reject employer's argument that the administrative law judge erred in citing *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 25 BLR 2-675 (6th Cir. 2014) in support of his determination to discredit the opinions of Drs. Rosenberg and Zaldivar that chronic bronchitis associated with coal dust exposure usually ceases with cessation of exposure. Employer's Brief at 12-13. As employer acknowledges, the United States Court of Appeals for the Sixth Circuit held that such reasoning is inconsistent with the Department of Labor's recognition that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); Employer's Brief at 12. Thus there is no merit to employer's contention that the administrative law judge's citation to *Keathley* is misplaced. Moreover,

Coal Co. of Va. v. Director, OWCP, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738, 25 BLR 2-675, 2-684-85 (6th Cir. 2014) ("Chronic bronchitis, when caused by exposure to coal mine dust, is a form of legal pneumoconiosis."). The administrative law judge further noted that Dr. Rosenberg relied on studies demonstrating that "90% of smokers have resolution of their cough and sputum production within 12 months" of being removed from exposures, and that "most patients" had a marked decrease in cough and sputum production within months of removal from exposures. Employer's Exhibit 3 at 14-15. The administrative law judge permissibly accorded less weight to Dr. Rosenberg's opinion because he relied on generalities about "the dissipation of symptoms in 'most patients' rather than particular facts about the [c]laimant's condition." Decision and Order at 25, *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). Because the administrative law judge's bases for discrediting the opinions of Drs. Rosenberg and Zaldivar are rational and supported by substantial evidence, they are affirmed. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000).

As the administrative law judge permissibly accorded little to no weight to the opinions of Drs. Rosenberg and Zaldivar,[10] the only opinions supportive of a finding that claimant does not have legal pneumoconiosis,[11] we affirm his finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.[12] 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 25-26.

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as no court has overturned that holding, employer's argument that it is erroneous is unavailing. Employer's Brief at 12-13.

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

[11] We decline to address employer's contentions of error regarding the administrative law judge's consideration of Dr. Ajjarapu's opinion, as it does not assist employer in establishing rebuttal of the Section 411(c)(4) presumption. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 9, 11.

[12] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Therefore, we need not address employer's contentions of error regarding the administrative law judge's

Employer also asserts that the administrative law judge erred in failing to find that 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). We disagree. Having permissibly discredited the opinions of Drs. Rosenberg and Zaldivar that claimant does not have legal pneumoconiosis, the administrative law judge permissibly found that their opinions are insufficient to establish this second means of rebuttal.[13] 20 C.F.R. §718.305(d)(1)(ii); *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 26-27. Because the administrative law judge permissibly discredited the opinions of Drs. Rosenberg and Zaldivar, the only opinions supportive of employer's burden on rebuttal at 20 C.F.R. §718.305(d)(1)(ii),[14] we affirm his determination that employer did not rebut the Section 411(c)(4) presumption by proving that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 26-27.

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finding that employer failed to disprove clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 6-9.

[13] Drs. Rosenberg and Zaldivar did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that legal pneumoconiosis was not disproven. The Fourth Circuit has held that such opinions cannot be credited on causation unless there are "specific and persuasive reasons" for concluding that the physicians' views on causation are independent of their mistaken belief that claimant does not have pneumoconiosis, in which case they could be assigned, at most, "little weight." *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015), *quoting Scott v. Mason Coal Co.*, 289 F.3d 262, 269-70, 22 BLR 2-373, 2-384 (4th Cir. 2002); *see also Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995) (recognizing that a doctor's judgment as to whether pneumoconiosis is a cause of a miner's disability is necessarily influenced by the accuracy of his underlying diagnosis). Employer does not cite to any evidence indicating that the opinions of Drs. Rosenberg and Zaldivar on the issue of causation are independent of their misdiagnosis that claimant does not have legal pneumoconiosis. *See Toler*, 43 F.3d at 116, 19 BLR at 2-83.

[14] Dr. Ajjarapu opined that claimant is totally disabled due in part to legal pneumoconiosis. Director's Exhibits 11, 18. We decline to address employer's contentions of error regarding the administrative law judge's consideration of Dr. Ajjarapu's opinion, as it does not assist employer in establishing rebuttal of the Section 411(c)(4) presumption. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 13-14.

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

RYAN GILLIGAN
Administrative Appeals Judge