U.S. Department of Labor

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

BRB No. 18-0004 BLA

JIMMY RAY PERDUE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
P-F MINING, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 11/28/2018
	)	
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 Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Leonard H. Gerson (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05226) of Administrative Law Judge Paul C. Johnson, Jr., 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 subsequent claim filed on January 20, 2014.[1]

The administrative law judge found that claimant established 15.4 years of underground coal mine employment,[2] and a totally disabling respiratory or pulmonary impairment pursuant 20 C.F.R. §718.204(b)(2).[3] Claimant therefore 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).[4] The administrative law judge further found that employer did not rebut the presumption, and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption.[5] Claimant has not filed a response brief.

[1] Claimant filed three prior claims, each of which was finally denied. Director's Exhibits 1-3. The most recent claim, filed on March 8, 2002, was denied by Administrative Law Judge Pamela J. Lakes because claimant failed to establish any element of entitlement. Director's Exhibit 3.

[2] Claimant's coal mine employment was in West Virginia. Decision and Order at 4; 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).

[3] Because the new evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).

[4] Under 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) (2012), as implemented by 20 C.F.R. §718.305.

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption and established a change in an

The Director, Office of Workers' Compensation Programs, responds in support of the award of benefits.

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that claimant 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 establish 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."[7] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v.*

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applicable condition of entitlement at 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[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] We reject employer's argument that the administrative law judge applied an improper rebuttal standard with respect to the presumed fact of legal pneumoconiosis when weighing the opinions of Drs. Fino and Castle. Employer's Brief at 11, 18-19. Rather, he properly evaluated the physicians' opinions based on their explanations for why they excluded coal mine dust exposure as a cause of claimant's respiratory impairments. Decision and Order at 29-32. Further, the administrative law judge correctly stated that employer can rebut the Section 411(c)(4) presumption by establishing that claimant does not have legal pneumoconiosis as defined in 20 C.F.R. §718.201(a)(2). Decision and Order at 29. He stated that legal pneumoconiosis "is a broader term that encompasses 'any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.'" *Id*. at 21, *quoting* 20 C.F.R. §718.201(a)(2). Pursuant to 20 C.F.R. §718.201(b), "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." Because the administrative law judge set forth the correct rebuttal standard, and properly weighed the physicians' opinions according to that standard, we reject employer's argument. *See*

Keystone Coal Mining Corp., 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered the medical opinions of Drs. Fino and Castle. Decision and Order at 29-32; Employer's Exhibits 1, 10, 15, 16. Dr. Fino diagnosed claimant with pulmonary emphysema and chronic obstructive bronchitis due to cigarette smoking, and unrelated to coal mine dust exposure. Employer's Exhibit 1 at 10, 17. Dr. Castle diagnosed chronic obstructive pulmonary disease due to cigarette smoking, unrelated to coal mine dust exposure. Employer's Exhibit 10 at 25. The administrative law judge discredited both physicians' opinions because he found that their explanations for excluding a diagnosis of legal pneumoconiosis were inconsistent with the regulations and the preamble to the 2001 revised regulations. Decision and Order at 32-34. He also found that their opinions were not adequately reasoned or documented. *Id*.

We reject employer's argument that the administrative law judge erred in discrediting the opinions of Drs. Fino and Castle. Employer's Brief at 11-22. The administrative law judge accurately noted that both physicians relied on the partial reversibility of claimant's impairment after the administration of a bronchodilator as a basis to exclude coal mine dust exposure as a cause of claimant's obstructive respiratory impairment. Decision and Order at 32; Employer's Exhibits 1, 10, 15. The administrative law judge noted, however, that the February 5, 2014 pulmonary function study conducted by Dr. Ammisetty "does not show reversibility with bronchodilators." Decision and Order at 32; *see* Director's Exhibit 14 at 7. Further, Dr. Fino conceded that, even after bronchodilator administration, claimant is still totally disabled by an obstructive respiratory impairment. Employer's Exhibit 15 at 10-11. Contrary to employer's argument, the administrative law judge permissibly discredited the opinions of Drs. Fino and Castle because he found that they are "not supported by the evidence in the record" and thus are not well-reasoned or documented. Decision and Order at 32; *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004).

Further, in excluding a diagnosis of legal pneumoconiosis, Dr. Fino opined that only six to eight percent of coal miners experience a clinically significant loss of lung function due to coal mine dust exposure, while ninety-two to ninety-four percent of miners experience an average loss of lung function that is not "clinically important." Employer's Exhibit 1 at 10-12. He explained that if a miner has a negative chest x-ray, as claimant did, that miner "will only have a [seven to ten percent] additional loss of FEV1" from coal mine dust exposure, which he indicated would not be disabling. *Id*. at 14. Finally, he explained that studies establish that "the impact of cigarette smoking is far greater than what [is]

Minich v. Keystone Coal Mining Corp., 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

described in the various articles referenced in the [preamble to the 2001 revised regulations]." *Id*. at 17. Contrary to employer's argument, the administrative law judge permissibly discredited Dr. Fino's opinion because he found that it is "based on generalized statistics" and is not specific to claimant's case. Decision and Order at 34; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 312-313 (4th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735 (7th Cir. 2013). Moreover, the administrative law judge permissibly found that Dr. Fino's opinion is not well-reasoned because he "failed to explain why [claimant's] coal [mine] dust exposure was not at least a contributing or aggravating factor to his impairment." Decision and Order at 34; *see* 20 C.F.R. §718.201(b); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

Dr. Castle opined that "obstruction due to coal workers' pneumoconiosis is typically associated with a normal or minimally reduced" FEV1/FVC ratio. Employer's Exhibit 10 at 24. Because claimant's FEV1/FVC ratio was "significantly reduced," Dr. Castle excluded a diagnosis of legal pneumoconiosis. *Id*. Contrary to employer's argument, the administrative law judge permissibly discredited Dr. Castle's opinion because his reasoning conflicts with the medical science accepted by the Department of Labor, recognizing that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013) (Traxler, C.J., dissenting); Decision and Order at 32.

The Board is not empowered to reweigh the evidence.[8] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).[9]

[8] Because we affirm the administrative law judge's decision to discredit the opinions of Drs. Fino and Castle for the reasons set forth above, we need not address employer's additional challenge to the administrative law judge's weighing of these opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Employer's Brief at 14-22.

[9] 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). Consequently, we need not address employer's arguments regarding the administrative law judge's finding that employer also failed to disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 8-11.

Upon finding that employer did not disprove legal pneumoconiosis, the administrative law judge addressed whether employer established that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge permissibly found that the same reasons for which he discredited the opinions of Drs. Fino and Castle that claimant does not have legal pneumoconiosis also undercut their opinions that no part of claimant's totally disabling respiratory or pulmonary impairment was caused by legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *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); Decision and Order at 33-34. We therefore 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 at 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