U.S. Department of Labor

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

BRB No. 17-0028 BLA

PAUL R. GIBSON, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CAM MINING, LLC	)	DATE ISSUED: 10/23/2017
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	
	)	
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 of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery), Prestonsburg, Kentucky, for claimant.

Paul E. Jones and Denise Hall Scarberry (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-06000) of Administrative Law Judge Steven D. Bell, rendered on a claim filed on December 10, 2012, 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 credited claimant with twenty-two years of coal mine employment, nineteen of which took place in underground mines. Additionally, the administrative law judge accepted the parties' stipulation that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and determined 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).[1] The administrative law judge further found that employer did not rebut the presumption and awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption.[2] Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.[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).

Once claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by

[1] 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); 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] Claimant's last coal mine employment was in Kentucky. Decision and Order at 3; Hearing Transcript at 10. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

establishing that claimant has neither legal nor clinical pneumoconiosis,[4] or 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)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

In addressing whether employer disproved the existence of legal pneumoconiosis, the administrative law judge was unpersuaded by the medical opinions of Drs. Dahhan and Broudy that claimant's severe obstructive ventilatory impairment is due solely to bronchial asthma, as opposed to coal dust exposure.[5] Decision and Order at 21; Director's Exhibits 12, 13; Employer's Exhibits 1-6. Decision and Order at 5-12, 17-22. The administrative law judge discounted the opinions of Drs. Dahhan[6] and Broudy[7], finding that the physicians' opinions were not well-reasoned. Decision and Order at 17-22. The administrative law judge therefore concluded that employer failed to establish that claimant does not have legal pneumoconiosis. *Id*. at 22.

[4] "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).

[5] The administrative law judge determined that Drs. Ebeo and Baker do not support employer's burden on rebuttal. Decision and Order at 18. Dr. Ebeo diagnosed severe bronchial asthma and opined that coal dust exposure significantly contributed to claimant's disabling respiratory impairment. Claimant's Exhibit 4. Dr. Baker diagnosed legal pneumoconiosis and opined that coal dust exposure may have contributed to claimant's obstructive impairment. Director's Exhibit 11.

[6] Dr. Dahhan opined that claimant has a moderately severe, partially reversible, obstructive ventilatory defect associated with mild air trapping and a normal diffusion capacity and diagnosed a disabling respiratory impairment due to bronchial asthma and not caused by coal dust exposure. Employer's Exhibits 2, 4.

[7] Dr. Broudy diagnosed a severe impairment with marked improvement after the administration of bronchodilators and opined that claimant's disabling respiratory impairment is due to asthma and chronic obstructive pulmonary disease unrelated to coal dust exposure. Employer's Exhibit 6.

Employer contends that substantial evidence demonstrates that claimant does not suffer from legal pneumoconiosis. Employer asserts that it was error for the administrative law judge to discount Dr. Dahhan's medical opinion "simply because Dr. Ebeo stated [claimant's] bronchial asthma was brought on by coal exposure." Employer's Brief at 6. Employer's contention lacks merit.

It is the province of the finder-of-fact to evaluate and assess conflicting medical evidence, draw inferences, and assess probative value. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). The determination of whether a medical opinion is documented and reasoned is a credibility determination left to the administrative law judge, and we may not substitute our judgment. *See Moseley v. Peabody Coal Co.*, 769 F.2d 357, 360, 8 BLR 2-22, 2-25 (6th Cir. 1985).

The administrative law judge acknowledged that "there appears to be a medical consensus that [claimant] suffers from bronchial asthma." Decision and Order at 22. He considered Dr. Dahhan's statement that, according to medical literature, coal dust is non-allergenic and "there is no evidence of increased incidence of bronchial asthma or hyperactive airway disease in an individual exposed to coal dust." Decision and Order at 21; *see* Director's Exhibit 13; Employer's Exhibit 3. He further noted that Dr. Dahhan's rationale was inconsistent with contrary opinion of claimant's treating physician, Dr. Ebeo, who concluded that claimant's bronchial asthma was "most likely" brought about by his exposure to coal dust. Decision and Order at 21, *quoting* Claimant's Exhibit 5. The administrative law judge concluded that Dr. Ebeo's opinion undermined the probative value of Dr. Dahhan's rationale since an "equally-qualified pulmonologist attested, with equally persuasive certainty, that coal dust can worsen, cause, or exacerbate underlying bronchial asthma." *Id.*

The administrative law judge further found that Dr. Dahhan eliminated coal mine dust exposure as a cause of claimant's obstructive ventilatory impairment, in part, because claimant demonstrated partial reversibility of his impairment following the use of bronchodilators. Decision and Order at 20. The administrative law judge noted, however, that Dr. Dahhan's rationale does not address "the fixed component" of claimant's obstruction that does not respond to bronchodilator use. *Id.* In light of this factor, the administrative law judge permissibly concluded that Dr. Dahhan failed to adequately explain why the miner's partial response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of claimant's non-reversible impairment. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 20.

Based on the foregoing, we affirm the administrative law judge's finding that because Dr. Dahhan's opinion is unpersuasive and, at best, in equipoise with the conflicting opinion of Dr. Ebeo, employer has failed to satisfy its burden to disprove the existence of legal pneumoconiosis.[8] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-6-9 (1994); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 21-22. Thus, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).[9]

Employer next challenges the administrative law judge's finding that employer failed to establish rebuttal by showing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). Employer solely argues, however, that "the analysis of legal pneumoconiosis and causation of any totally disabling respiratory or pulmonary impairment is similar and the substantial evidence of record established that any impairment [claimant] may have has not been caused by pneumoconiosis." Employer's Brief at 6-7. Employer's argument lacks specificity with regard to any alleged error by the administrative law judge and is a request to reweigh the evidence. The Board is not empowered to engage in a de novo proceeding or unrestricted review of a case brought before it, however, and must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Thus,

[8] The administrative law judge discounted Dr. Broudy's opinion, the only other opinion supportive of a finding that claimant does not suffer from legal pneumoconiosis, because Dr. Broudy, like Dr. Dahhan, also relied on the partial reversibility of claimant's obstructive impairment after the administration of bronchodilators to conclude that claimant's impairment was due to asthma. Decision and Order at 20; Director's Exhibit 12; Employer's Exhibits 1, 5, 6. Because we have rejected employer's arguments regarding the administrative law judge's weighing of Dr. Dahhan's opinion, and employer has not alleged any error in the administrative law judge's credibility determination with respect to Dr. Broudy's medical opinion, we also affirm the administrative law judge's finding that Dr. Broudy's opinion is insufficient to rebut the presumed fact of legal pneumoconiosis as it is supported by substantial evidence. *See Skrack*, 6 BLR at 1-711.

[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). We therefore need not address employer's contentions of error regarding the administrative law judge's finding that employer also failed to establish that claimant does not have clinical pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

we affirm the administrative law judge's finding that employer failed to disprove the presumed fact of disability causation under 20 C.F.R. §718.305(d)(1)(ii) and affirm the administrative law judge's award of benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge