U.S. Department of Labor

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

BRB No. 17-0632 BLA

CLARENCE BENTLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
T & T MANAGEMENT COMPANY, INCORPORATED	)	DATE ISSUED: 10/18/2018
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman and Andrea Berg (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-5714) of Administrative Law Judge Natalie A. Appetta, 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). Claimant filed this subsequent claim on March 25, 2015.[1]

The administrative law judge found that claimant established at least forty 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] She therefore 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).[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] Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

[1] Claimant's prior claim, filed on March 19, 1973, was denied by the Social Security Administration on March 2, 1974 for failure to establish total disability. Director's Exhibit 1 (unpaginated). The claim was forwarded to the Department of Labor, where it was denied by the district director on May 9, 1980, because the evidence did not establish any element of entitlement. *Id*.

[2] Claimant's coal mine employment was in West Virginia. Decision and Order at 3 n.5; Director's Exhibit 4; Hearing Transcript at 30. 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 that claimant is totally disabled 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. Decision and Order at 9-10.

[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 findings that claimant invoked the Section 411(c)(4) presumption and established a change in an

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. 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).

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, 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.

Employer does not challenge the finding that it failed to disprove clinical pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(B). Decision and Order at 29. Accordingly, we affirm that finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Nevertheless, because legal pneumoconiosis is relevant to the second method of rebuttal, we will address the administrative law judge's finding that employer also failed to disprove legal pneumoconiosis. *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting).

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*, 25 BLR

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applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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 legal pneumoconiosis by requiring its doctors to

at 1-155 n.8. In determining that employer failed to rebut the presumption, the administrative law judge considered the medical opinions of Drs. Castle and Spagnolo.[8] Decision and Order at 29-32; Employer's Exhibits 4-5, 8-9.

Dr. Castle opined that claimant's pulmonary function testing is consistent with "tobacco smoke induced airway obstruction," and explained that this condition is unrelated to claimant's coal mine dust exposure. Employer's Exhibit 4 at 26-27. He also noted that claimant developed lung cancer as a result of his cigarette smoking history. *Id.* Dr. Castle explained that, because of his lung cancer, claimant had multiple chest surgeries, including lung resection and decortication.[9] *Id.* Dr. Castle diagnosed claimant with restrictive lung disease due to his multiple lung cancer-related surgeries and his morbid obesity, and opined that the restrictive lung disease is unrelated to coal mine dust exposure. *Id.* In his deposition, Dr. Castle testified that claimant may have chronic bronchitis based on his chronic cough and sputum production, but opined that this condition was caused by

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rule out the possibility that coal mine dust contributed to claimant's obstructive or restrictive lung diseases. Employer's Brief at 20-21. As an initial matter, the administrative law judge did not require employer's physicians to rule out coal dust exposure as a cause of claimant's impairments. Rather, she properly evaluated the physicians' opinions based on their explanations as to why they excluded coal dust exposure as a cause. Decision and Order at 23-32. Further, the administrative law judge correctly stated that "an employer can rebut [the presumed fact of] legal pneumoconiosis by proving that a miner does not have a lung disease 'significantly related to, or substantially aggravated by, dust exposure in coal mine employment' by a preponderance of the evidence." *Id.* at 8, *quoting* 20 C.F.R. §718.201(b). 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 Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

[8] The administrative law judge also considered Dr. Ajjarapu's opinion diagnosing claimant with legal pneumoconiosis, in the form of chronic bronchitis due to both smoking and coal mine dust exposure. Decision and Order at 29-30; Director's Exhibit 18.

[9] Decortication is defined as the "removal of portions of the cortex of a structure or organ, as of the brain, kidney, or lung." Dorland's Illustrated Medical Dictionary 476 (32d ed. 2012). Dr. Castle explained that because claimant developed complications from the lung surgery that was done to treat his cancer, he needed to undergo decortication, the removal of his right upper lung lobe. Employer's Exhibit 9 at 13-14. Dr. Castle noted that, after claimant experienced further complications, he underwent additional chest surgeries to relieve the build-up of fluid. *Id.*

claimant's cigarette smoking history and lung cancer, and not coal mine dust exposure. Employer's Exhibit 9 at 33-34.

Dr. Spagnolo opined that claimant's 2015 pulmonary function testing "suggests a possible obstructive defect along with a mild restrictive defect." Employer's Exhibit 5 at 11. He opined that these results are consistent with the effects of numerous lung surgeries due to claimant's lung cancer. *Id*. He concluded that none of claimant's "clinical findings and respiratory complaints" are related to coal mine dust exposure. *Id*. at 11-12. During his deposition, Dr. Spagnolo testified that claimant's lung cancer was likely related to his cigarette smoking, and unrelated to coal mine dust exposure. Employer's Exhibit 8 at 15-17. He stated that claimant's pulmonary function studies were "primarily" consistent with a restrictive lung defect, with "no real evidence of" an obstructive lung defect. *Id*. at 16-17. He further stated that claimant's obesity may have also caused his restrictive lung defect. *Id*.

The administrative law judge discredited Dr. Castle's opinion because she found that Dr. Castle's explanation for excluding a diagnosis of legal pneumoconiosis was inconsistent with the regulations and the preamble to the 2001 revised regulations. Decision and Order at 30-31. She also found that Dr. Castle's opinion was inadequately explained and equivocal. *Id*. The administrative law judge discredited Dr. Spagnolo's opinion because she found that it was not adequately reasoned or documented. *Id*.

We reject employer's argument that the administrative law judge erred in discrediting Dr. Castle's opinion. Employer's Brief at 7-16. Dr. Castle opined that claimant's obstructive respiratory impairment is "typical of tobacco smoke induced airway obstruction" because there is "a significant reduction" in the FEV1/FVC ratio on pulmonary function testing. Employer's Exhibit 4 at 26. He explained that "[w]hile coal mine dust exposure may cause obstruction, it does not cause a significant reduction in the FEV1%." *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 (DOL), 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 30.

Further, Dr. Castle testified that claimant's chronic bronchitis is unrelated to coal mine dust exposure because bronchitis related to coal mine dust exposure "generally abates within about six months of cessation of exposure." Employer's Exhibit 9 at 33-34. The administrative law judge permissibly discredited Dr. Castle's reasoning as inconsistent with the DOL'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); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992). Moreover, the administrative law judge permissibly found that "Dr. Castle did not sufficiently address or explain why [c]laimant's forty years of coal mine dust exposure" did not contribute to, or substantially aggravate claimant's obstructive impairment.[10] Decision and Order at 31; *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).

We also reject employer's argument that the administrative law judge erred in discrediting Dr. Spagnolo's opinion. Employer's Brief at 16-21. The administrative law judge noted that treatment records from 2014 and 2015 include multiple diagnoses of chronic obstructive pulmonary disease (COPD), and that both Drs. Castle and Ajjarapu agreed that claimant's pulmonary function testing was consistent with an obstructive respiratory impairment. Decision and Order at 31-35; Director's Exhibits 18, 51; Claimant's Exhibit 5; Employer's Exhibit 4. The administrative law judge permissibly found that Dr. Spagnolo's opinion that claimant's pulmonary function testing "reveal[s] a primarily restrictive defect with no real evidence of obstruction," merited little weight because it was "contrary to the weight of the evidence. . . ." *Id*. at 32; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013); *Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; *Lane v. Union Carbide Corp*., 105 F.2d 166, 174, (4th Cir 1997). The administrative law judge also permissibly found that Dr. Spagnolo . . . does not adequately explain why [claimant's] forty years of coal mine dust exposure" did not contribute to or aggravate claimant's lung disease. Decision and Order at 32; *see* 20 C.F.R. §718.201(b); *Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441.

The Board is not empowered to reweigh the evidence. *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 prove that claimant does not have legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A).[11]

[10] Because we affirm the administrative law judge's decision to discount Dr. Castle's opinion for the reasons set forth above, we need not address employer's additional challenge to the administrative law judge's weighing of his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Employer's Brief at 16-21.

[11] Because it is employer's burden to establish rebuttal, and the administrative law judge permissibly discredited the opinions of employer's doctors, we need not address employer's arguments regarding Dr. Ajjarapu's opinion that claimant has legal

The administrative law judge next addressed whether employer established that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 37-39. The administrative law judge rationally discounted the disability causation opinions of Drs. Castle and Spagnolo because neither physician diagnosed claimant with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *See Epling*, 783 F.3d at 504-05; *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 38-39. 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. *See* 20 C.F.R. §718.305(d)(1)(ii).

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

pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 21-24.