U.S. Department of Labor

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

BRB No. 18-0555 BLA

DONLEY F. UNDERWOOD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
QUARTO MINING COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 10/25/2019
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Cheryl L. Intravaia (Feirich Mager Green Ryan) Carbondale, Illinois, for employer/carrier.

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-05951) of Administrative Law Judge Drew A. Swank rendered on a subsequent claim filed on September 25, 2015,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited claimant with at least twenty-one years of underground coal mine employment[2] and found he is totally disabled. 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found claimant invoked the presumption he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012).[3] He further found employer failed to rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge applied the wrong legal standard and otherwise erred in finding that it failed to rebut the Section 411(c)(4) presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response urging the

[1] Claimant's prior claim, filed on March 26, 1999, was finally denied by the district director on July 2, 1999, because he did not establish any element of entitlement. Director's Exhibit 1.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment was in Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Tr. at 13.

[3] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b).

[4] 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); 20 C.F.R. §725.309(c); Decision and Order at 7, 23.

Board to reject employer's argument that invocation under Section 411(c)(4) does not give rise to a presumption of legal pneumoconiosis. Employer has filed replies to both claimant's and the Director's briefs reiterating its arguments on appeal.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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, the burden shifted to employer to establish he has neither legal nor clinical pneumoconiosis,[5] 20 C.F.R. §718.305(d)(1)(i), or "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)(ii). The administrative law judge found employer failed to establish rebuttal by either method.[6]

To disprove legal pneumoconiosis,[7] employer must demonstrate claimant 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),

[5] "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).

[6] The administrative law judge found that employer disproved clinical pneumoconiosis. Decision and Order at 15.

[7] Employer's argument that invocation of the Section 411(c)(4) presumption does not include a presumption of legal pneumoconiosis lacks merit and is rejected. *See* 20 C.F.R. §718.305(d)(1)(i)(A); *Consolidation Coal Co. v. Director, OWCP* [*Ross*], 911 F.3d 824, 844-45 (7th Cir. 2018) (rejecting identical argument); *Consolidation Coal Co. v. Director, OWCP* [*Noyes*], 864 F.3d 1142, 1146-50 (10th Cir. 2017) (same); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1070 (6th Cir. 2013) (affirming the administrative law judge's determination that the employer failed to rebut the presumed fact of legal pneumoconiosis); *Barber v. Director, OWCP*, 43 F.3d 899, 900-01 (4th Cir. 1995); Employer's Brief at 8-10.

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 medical opinions of Drs. Fino and Zaldivar that claimant does not have legal pneumoconiosis. Decision and Order at 13-14; Employer's Exhibits 3-7, 10-11. Both doctors diagnosed a disabling respiratory impairment and attributed it to asthma. Employer's Exhibits 3, 4, 6. They explained asthma is a disease of the general population and is not caused or aggravated by coal mine dust exposure.[8] *Id*. The administrative law judge discredited their opinions because he found their explanations for excluding a diagnosis of legal pneumoconiosis contrary to the preamble to the 2001 revised regulations.[9] Decision and Order at 15, 26.

[8] Dr. Fino stated that "[a]lthough one may have exacerbation of asthma in the coal mines, there is no evidence of an aggravation - which to me would be the permanent worsening of a pre-existing non-coal mine related condition." Employer's Exhibit 3 at 8. He testified that coal mine dust exposure can "exacerbate the symptoms" of asthma but not "make it progress further." Employer's Exhibit 5 at 23. Dr. Zaldivar stated neither asthma nor pulmonary emboli "are related to [claimant's] prior work in the coal mine. They are not caused nor are they related to it in anyway." Employer's Exhibit 6 at 7. He testified that although coal mine dust can exacerbate the symptoms of asthma, he likened it to an "allergen in the environment" and stated, "when [the miner] walk[s] away from that area, they feel better[.]" Employer's Exhibit 7 at 15-16. He stated further, "As I said, asthma and pulmonary emboli has nothing to do with a coal mine." *Id*. at 23.

[9] Prior to analyzing the medical evidence, the administrative law judge correctly stated employer must "establish the absence" of a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 15, *quoting* 20 C.F.R. §§718.201(a)(2), (b). Any error in also referencing the phrase "entirely unrelated to coal mine dust exposure" in his consideration of the evidence on legal pneumoconiosis, Decision and Order at 15, is harmless, as he ultimately did not reject the opinions of employer's experts for failing to satisfy a particular rebuttal standard. Rather, he concluded that employer's experts did not disprove the existence of legal pneumoconiosis because the bases for their opinions were not credible. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 15, 26. Thus, we reject employer's assertion that the case must be remanded for consideration under the proper rebuttal standard. *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-1-55 n.8 (2015) (Boggs, J., concurring and dissenting); Employer's Brief at 6-7.

Employer asserts the administrative law judge erred in finding Drs. Fino and Zaldivar expressed views on asthma that conflict with the preamble. Employer's Brief at 7-8, 10. Employer's argument has no merit. The administrative law judge correctly noted that in the preamble the Department of Labor (DOL) recognized that chronic obstructive pulmonary disease (COPD) includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema, and asthma. Decision and Order at 15, 26, *citing* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). It further sets forth that coal mine dust exposure may cause COPD, 65 Fed. Reg. at 79,939, and "cites at least one example of a study that demonstrates the link between coal [mine] dust exposure and asthma." *Helen Mining Co. v. Elliott*, 859 F.3d 226, 240 (3d Cir. 2017), *citing* 65 Fed. Reg. at 79,943. In light of the medical literature the DOL relied upon in the preamble, the administrative law judge permissibly found the opinions of Drs. Fino and Zaldivar that coal mine dust does not cause asthma to be an unpersuasive explanation for why claimant does not have legal pneumoconiosis. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Elliott*, 859 F.3d at 240 (holding administrative law judge permissibly discredited medical opinions that coal mine dust does not cause asthma as inconsistent with preamble); Decision and Order at 15, 26.

On the issue of whether 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," the administrative law judge again weighed the opinions of Drs. Fino and Zaldivar. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 26. As discussed above, both doctors attributed claimant's disabling respiratory impairment to asthma. Employer's Exhibits 3-7, 10-11. We have affirmed the administrative law judge's finding that employer did not disprove that claimant's asthma is legal pneumoconiosis. Thus the administrative law judge rationally found the same reasons he provided for discrediting the opinions of Drs. Fino and Zaldivar on legal pneumoconiosis also undermined their opinions that claimant's disabling respiratory impairment was not caused by pneumoconiosis.[10] *See Big Branch Res., Inc. v. Ogle*, 737

[10] The administrative law judge set forth the incorrect rebuttal standard at 20 C.F.R. §718.305(d)(1)(ii) as he stated employer must disprove "that coal workers' pneumoconiosis is a 'substantially contributing cause' of [c]laimant's total pulmonary or respiratory disability." Decision and Order at 26. However, the administrative law judge's identification of an incorrect "substantially contributing cause" standard for rebuttal of causation is less demanding than the correct "no part" standard he should have applied. Further, as discussed above, he found the opinions of Drs. Fino and Zaldivar insufficient to disprove the presumption of disability causation because the bases for their opinions

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 26. 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).

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were not credible. Thus any error in the use of the incorrect standard at 20 C.F.R. §718.305(d)(1)(ii) is harmless. *See Larioni*, 6 BLR at 1-1278.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge