U.S. Department of Labor

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

BRB No. 19-0049 BLA

RUSSELL L. HERNDON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HIOPE MINING, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 10/17/2019
	)	
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 Carrie Bland, Administrative Law Judge, United States Department of Labor.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05559) of Administrative Law Judge Carrie Bland rendered on a claim filed on April 15, 2014, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge found claimant established 24.28 years of underground coal mine employment, accepted employer's concession that claimant is totally disabled and, therefore, found claimant invoked the Section 411(c)(4) presumption.[1] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.204(b)(2); Decision and Order at 4, 6. She further determined that employer failed to rebut the presumption and awarded benefits. Decision and Order at 15-16.

On appeal, employer contends the administrative law judge erred in finding it failed to rebut the Section 411(c)(4) presumption. Claimant did not file a response brief, and the Director, Office of Workers' Compensation Programs, declined to file a substantive response.[2]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order 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).

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to establish that claimant has neither

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the evidence 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.

[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); Decision and Order at 6.

[3] Claimant's coal mine employment was in Virginia and West Virginia. Director's Exhibit 3. 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).

legal nor clinical pneumoconiosis,[4] or 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. Decision and Order at 9, 14-15.

Employer asserts the administrative law judge improperly rejected the opinions of Drs. Fino and Zaldivar that claimant's impairment is due to obesity, not coal mine dust exposure, and generally contends she failed to apply the correct standard in finding the relevant evidence insufficient to rebut the presumption that claimant suffers from legal pneumoconiosis. Employer's Brief at 17-20. We disagree.

Contrary to employer's contention, the administrative law judge applied the correct legal standard that to disprove legal pneumoconiosis, it must demonstrate claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 6, 13, 14 n.11, 15; 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, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge rationally rejected the opinions of Drs. Fino[5] and Zaldivar[6]

[4] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id*. 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 permissibly found that Dr. Fino's analysis did not factor in claimant's "24 plus years" of underground coal mine employment, failed to relate claimant's symptoms to his condition, and merely stated that claimant's objective testing revealed disability due to obesity. Decision and Order at 13; Employer's Exhibits 1, 5. Further, employer's assertion that Dr. Jawad's treatment notes that claimant's restrictive lung disease was secondary to "body habitus" bolster Dr. Fino's opinion is misplaced. Employer's Brief at 17; Claimant's Exhibit 4 at 5. Neither employer nor Dr. Fino address Dr. Jawad's opinion that claimant has a mixed obstructive and restrictive lung disease. They also did not acknowledge that Dr. Jawad treated claimant for coal workers' pneumoconiosis, determined his shortness of breath was secondary to coal workers' pneumoconiosis, and interpreted the pulmonary function studies he conducted as showing moderate obstructive disease. Claimant's Exhibit 4 at 2, 5, 8.

[6] The administrative law judge rationally found that Dr. Zaldivar did not account for

because they failed to adequately account for why claimant's 24.28 years of heavy dust exposure in underground employment was not a significantly contributing or substantially aggravating factor in his impairment.[7] *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 13-14; Employer's Exhibits 1, 5, 6. Thus, the administrative law judge rationally found their opinions entitled to reduced weight and insufficient to rebut the presumption that claimant suffers from legal pneumoconiosis. *See Clark*, 12 BLR at 1-155; Decision and Order at 14. As there are no other medical opinions supportive of employer's burden, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis. *Owens*, 724 F.3d at 558. Employer's failure to disprove legal pneumoconiosis precludes a finding that it established claimant does not have pneumoconiosis.[8] 20 C.F.R. §718.305(d)(1)(i).

Further, we also affirm as unchallenged the administrative law judge's finding that employer failed to rebut the presumption of disability causation. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Consequently, we affirm the administrative law

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claimant's work history and working conditions in concluding there is "no measurement" to determine whether claimant has heavy coal dust exposure. Decision and Order at 14; Employer's Exhibit 6. Neither employer nor Dr. Zaldivar offer any evidence to refute claimant's hearing testimony that he was exposed to rock dust five to six days per week, eight to ten hours per day, and that he would be black with coal dust covering his clothes, face and hands at the end of the day. Hearing Transcript at 17. Claimant testified he would clean himself at a bath house at the end of the work day before going home. *Id.* He also stated he washed his dust-covered work clothes separately from his other clothes, occasionally wore a respirator, and could see only two to four feet in front of him when he worked on the longwalls because of the amount of coal dust. *Id.* at 18, 20-21, 26-27.

[7] Because the administrative law judge provided a valid reason for discrediting the opinions of Drs. Fino 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). Further, as 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. Forehand's opinion that claimant has legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 14.

[8] Consequently, we need not address employer's arguments regarding the administrative law judge's weighing of the evidence on the issue of clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278.

judge's finding that it failed to rebut the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge