U.S. Department of Labor

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

BRB No. 15-0484 BLA

JAMES A. HARRISON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 09/30/2016
	)	
Employer-Petitioner	)	
	)	
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 John P. Sellers III, Administrative Law Judge, United States Department of Labor.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Maia Fisher, 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-05759) of Administrative Law Judge John P. Sellers III,[1] rendered on a subsequent claim filed on September 11, 2012, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[2] The administrative law judge found that claimant established twenty-one years and three months of underground coal mine employment and a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i), (iv). The administrative law judge determined, therefore, that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and 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).[3] The administrative law judge then 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 employer did not rebut the presumed existence of legal pneumoconiosis or the presumed causal relationship between pneumoconiosis and claimant's totally disabling respiratory impairment. Claimant has not filed a response brief in this appeal. The Director, Office

[1] Administrative Law Judge Linda S. Chapman conducted the hearing in this claim on August 26, 2014. Decision and Order at 2; Hearing Transcript. The parties were subsequently notified that she retired from the Office of Administrative Law Judges and that the case was reassigned to Administrative Law Judge John P. Sellers III (the administrative law judge) on April 13, 2015. Decision and Order at 2.

[2] Claimant filed his initial claim for benefits on April 12, 2000, which the district director denied by reason of abandonment on July 13, 2000. Director's Exhibit 1. Claimant filed a second claim for benefits on November 15, 2001, which the district director denied on October 15, 2002, because claimant did not establish any element of entitlement. Director's Exhibit 2. Claimant subsequently requested modification, which was ultimately denied by Administrative Law Judge Pamela Lakes Wood on October 17, 2006. *Id*. Because Judge Wood found that claimant did not establish the existence of pneumoconiosis, she did not reach the other elements of entitlement. *Id*. Claimant did not take any further action before filing the current claim. Director's Exhibit 3.

[3] Under Section 411(c)(4) of the Black Lung Benefits Act, a miner's total disability is presumed to be due to pneumoconiosis if he or she had 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(b).

of Workers' Compensation Programs (the Director), responds and urges affirmance of the award of benefits. The Director contends that, based on the administrative law judge's unchallenged finding that employer failed to rebut the presumed existence of clinical pneumoconiosis, the opinions of employer's experts are legally insufficient to rebut the presumed causal relationship between clinical pneumoconiosis and claimant's total respiratory disability. The Director further maintains, in the alternative, that the administrative law judge rationally found that employer failed to rebut both the presumed existence of legal pneumoconiosis and the presumed causal relationship between legal pneumoconiosis and claimant's total respiratory disability.[4]

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.[5] 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 of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis, or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129 (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-46 (2015) (Boggs, J., concurring and dissenting).

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established: twenty-one years and three months of underground coal mine employment; a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2); invocation of the Section 411(c)(4) presumption; and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibit 5; Hearing Transcript at 25. 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).

I. Rebuttal of the Presumed Existence of Pneumoconiosis

A. Legal Pneumoconiosis

To establish rebuttal of the presumed existence of legal pneumoconiosis,[6] employer submitted the opinions of Drs. Killeen and Castle, who attributed claimant's obstructive respiratory impairment solely to asthma and smoking-induced emphysema. Employer's Exhibits 3-4, 6-7, 10-11. In Dr. Killeen's written report, he indicated that the "[p]ulmonary function studies document significant bronchodilator reversibility and only mild reduction in previous diffusion capacity[,]" which "is consistent with asthma and not consistent with coal workers[']s pneumoconiosis." Employer's Exhibit 3. Dr. Killeen acknowledged that bullous emphysema can be due to coal dust exposure but "the late onset of symptoms and findings are most consistent with tobacco related lung disease." *Id*. At his deposition, Dr. Killeen indicated that there was a residual, fixed respiratory impairment but testified that claimant "does have a history of tobacco, which could be one of the most common causes of fixed airway obstruction. Second would be if he had poor control of asthma over long periods of time, that could cause irreversible airway obstruction." Employer's Exhibit 7 at 27-28.

Dr. Castle excluded any contribution to claimant's impairment from coal dust exposure, based on a finding of "severe airway obstruction with a marked degree of bronchoreversibility[,]" which Dr. Castle found was "entirely typical of and indicative of tobacco smoke induced airway obstruction with a significant asthmatic component." Employer's Exhibit 4. Dr. Castle subsequently testified that "when coal workers' pneumoconiosis causes impairment, it causes a mixed, irreversible, obstructive and restrictive impairment" and claimant in this case "demonstrated a very significant variability of airway obstruction over time" and a "marked degree of bronchoreversibility[,]" which is more typical of a bronchial asthma and tobacco smoke-induced obstructive impairment. Employer's Exhibit 6 at 39.

Employer argues that the administrative law judge erred in discrediting the opinions of Drs. Killeen and Castle. The administrative law judge's findings, however, are supported by substantial evidence because neither physician adequately considered

[6] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The regulation also provides that "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." 20 C.F.R. §718.201(b) (emphasis added).

whether coal mine dust could have played a role in claimant's impairment. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998). Legal pneumoconiosis is present when coal mine dust contributes to or aggravates a respiratory condition, even if it is not the main or sole etiology. 20 C.F.R. §718.201(b); *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, 25 BLR 2-255, 2-263 (4th Cir. 2013) (explaining that the regulations envision the possibility of coal mine dust exposure as one of several causes of a miner's respiratory impairment). To rebut the fifteen year presumption, the party opposing entitlement therefore must disprove aggravation of the miner's respiratory conditions by dust exposure. *See Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995).

The administrative law judge acknowledged that both Drs. Killen and Castle explained that the fixed component of claimant's respiratory impairment was caused by airway remodeling due to chronic inflammation from his non-occupational asthma. Even assuming that airway remodeling had occurred, however, he rationally found that they did not explain why coal dust could not have also aggravated or contributed to the impairment, and he permissibly discredited them on that basis. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); Decision and Order at 23; *see* Employer's Exhibits 6 at 41-42, 7 at 24-25. We therefore affirm the administrative law judge's determination that the opinions of Drs. Killeen and Castle are insufficient to establish rebuttal at 20 C.F.R. §718.305(d)(1)(i)(A).[7] *See Cochran*, 718 F.3d at 323, 25 BLR at 2-263.

B. Clinical Pneumoconiosis

The administrative law judge next considered whether employer rebutted the presumed existence of clinical pneumoconiosis[8] based on the x-ray or medical opinion

[7] Accordingly, we need not address the remaining allegations of error employer has raised regarding the administrative law judge's weighing of the opinions of Drs. Killeen and Castle. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-3 n.4 (1983).

[8] Clinical pneumoconiosis is defined as:

> [T]hose 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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis,

evidence. Decision and Order at 17-22. The administrative law judge found "the weight of the new analog x-ray evidence is clearly positive for the presence of simple clinical pneumoconiosis," and "[t]he new digital x-ray evidence is inconclusive and therefore does not detract from the weight of the analog x-ray evidence." Decision and Order at 19; Director's Exhibit 11; Claimant's Exhibits 1-2, 3-5; Employer's Exhibits 1, 3, 5, 9.

Weighing the medical opinion evidence, the administrative law judge discredited Dr. Killeen's opinion that claimant does not have clinical pneumoconiosis because Dr. Killeen does not believe that the disease can develop after coal dust exposure ends. Decision and Order at 20-21; Employer's Exhibits 3, 7, 11. The administrative law judge discredited Dr. Castle's opinion because he found that it is contrary to his finding that the evidence is sufficient to establish clinical pneumoconiosis.[9] Decision and Order at 21-22; Employer's Exhibits 4, 6, 10. The administrative law judge gave less weight to the evidence developed in conjunction with claimant's previous claim, which was adjudicated in 2004, because pneumoconiosis is a latent and progressive disease. Decision and Order at 19-22. Based on these findings, the administrative law judge concluded that employer failed to rebut the presumed existence of clinical pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(B). *Id*. at 22.

In its brief on appeal, employer states that claimant does not have clinical pneumoconiosis but subsequently explicitly admits that the administrative law judge's finding of clinical pneumoconiosis "may be supported by substantial evidence." Employer's Brief at 4. Employer's assertion does not amount to an allegation of specific error in the administrative law judge's finding that employer failed to rebut the presumed

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> massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

[9] The administrative law judge noted that Dr. Castle relied on his own negative reading of the digital x-ray dated September 18, 2013, which was not admitted into the record, but found that this did not detract from Dr. Castle's opinion because his interpretation was essentially the same as Dr. Meyer's negative interpretation of the same x-ray, which was admitted into the record. Decision and Order at 21-22. The administrative law judge then determined that Dr. DePonte, who is as qualified as Dr. Meyer, read the same digital x-ray as positive for clinical pneumoconiosis. *Id*. at 22. The administrative law judge reiterated that he found the weight of the digital x-ray evidence inconclusive and that the analog x-ray evidence is positive for pneumoconiosis. *Id*.

existence of clinical pneumoconiosis. Therefore, we affirm that finding. *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). We further affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption under the first prong of 20 C.F.R. §718.305(d)(1).

II. Rebuttal of the Presumed Causal Relationship

In considering whether employer rebutted the presumed fact of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii), employer argues that the administrative law judge violated the Administrative Procedure Act[10] because he did not "consider whether there were persuasive reasons to credit the opinions of Drs. Killeen and Castle despite their diagnoses of the absence of pneumoconiosis." Employer's Brief at 5.

Employer's allegation does not have merit. The administrative law judge rationally discounted the opinions of Drs. Killeen and Castle that claimant's disability was not due to pneumoconiosis because these physicians did not diagnose clinical or legal pneumoconiosis, contrary to the administrative law judge's findings. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013). We affirm, therefore, the administrative law judge's conclusion that these opinions are insufficient to establish that "no part of [claimant's] pulmonary impairment was caused by pneumoconiosis," as defined in 20 C.F.R. §718.201. 20 C.F.R. §718.305(d)(1)(ii). Based on our affirmance of the administrative law judge's findings under 20 C.F.R. §718.305(d)(1)(i) and (ii), we further affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption.

[10] The Administrative Procedure Act, 5 U.S.C. §500 *et seq*., as incorporated into the Act by 30 U.S.C. §932(a), provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented." 5 U.S.C. §557(c)(3)(A).

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