U.S. Department of Labor

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

BRB No. 18-0527 BLA

JERRY MARTIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEXTET MINING CORPORATION	)	
	)	
and	)	
	)	
ARROWPOINT CAPITAL SECURITY INSURANCE COMPANY OF HARTFORD	)	DATE ISSUED: 09/27/2019
	)	
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 Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for claimant.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for employer/carrier.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-05176) of Administrative Law Judge Jonathan C. Calianos pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on November 16, 2012.

The administrative law judge accepted the parties' stipulations that claimant has twenty-one years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. Thus, he found claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found employer failed to rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[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).

[1] Under Section 411(c)(4) of the Act, claimant is presumed totally disabled due to pneumoconiosis if he has 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).

[3] 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 Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish claimant has neither clinical nor legal pneumoconiosis[4] 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 employer failed to rebut the presumption by either method.

Legal Pneumoconiosis

After finding employer disproved clinical pneumoconiosis, 20 C.F.R. §§718.201(a)(1), 718.305(d)(1)(i)(B), the administrative law judge addressed legal pneumoconiosis. Decision and Order at 24-29. To disprove legal pneumoconiosis, employer 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." 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 considered the medical opinions of Drs. Tuteur and Houser.[5] Dr. Tuteur opined claimant does not have legal pneumoconiosis but has totally disabling chronic obstructive pulmonary disease (COPD) due solely to cigarette smoking. Employer's Exhibit 3. Dr. Houser opined claimant does not have legal pneumoconiosis but has emphysema primarily due to his extensive smoking history. Director's Exhibit 13. The administrative law judge found their opinions inadequately

[4] Clinical pneumoconiosis is defined as "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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1). "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).

[5] The administrative law judge also considered the medical opinions of Drs. Baker and Chavda. Decision and Order at 25-26. Dr. Baker diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) related to cigarette smoking and coal dust exposure. Claimant's Exhibit 3. Dr. Chavda also diagnosed legal pneumoconiosis in the form of an obstructive airway disease related to coal dust exposure and smoking. Director's Exhibit 12.

explained and, therefore, insufficient to disprove legal pneumoconiosis. Decision and Order at 29.

We reject employer's assertion the administrative law judge erred in discrediting the opinions of Drs. Tuteur and Houser. He permissibly found neither physician adequately explained why claimant's coal mine dust exposure did not significantly contribute, along with the other factors, to his obstructive pulmonary disease. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 29. Specifically, he noted Dr. Tuteur acknowledged that inhalation of both tobacco smoke and coal mine dust may produce the COPD phenotype, but excluded coal mine dust-inhalation as a risk factor of claimant's disease. Decision and Order at 26; Employer's Exhibit 3 at 4. Relying on medical literature, Dr. Tuteur stated "[i]t [is] well recognized and rigorously established that lifelong never mining cigarette smokers develop clinically meaningful airflow obstruction about 20% of the time" while "never smoking coal miners develop the same clinical picture 1% of the time or less." Employer's Exhibit 3 at 4. He then compared the relative risk of COPD among smokers who never mined coal to the risk of nonsmoking coal miners and opined that claimant's disabling COPD is due to tobacco smoke, not coal mine dust. *Id*. at 5-6.

The administrative law judge permissibly found Dr. Tuteur's opinion inadequately reasoned because it is based on "statistical probabilities" rather than claimant's specific condition. Decision and Order at 27-28; Employer's Exhibit 3 at 6; *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). The administrative law judge further permissibly found that, even if Dr. Tuteur were correct that coal dust induced COPD is rare, he did not explain why claimant is not one of the "statistically rare cases." Decision and Order at 27-28; *see Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255. Additionally, while Dr. Tuteur stated it is possible but highly unlikely that coal mine dust influenced claimant's COPD, the administrative law judge found he did not explain why coal mine dust did not contribute in this case beyond his reliance on probabilities. *See Rowe*, 710 F.2d at 255; Decision and Order at 27.

Dr. Houser opined that claimant has emphysema "primarily" due to his extensive smoking, which he stated is the predominant cause of COPD/emphysema. Director's Exhibit 13 at 5. He further stated that exposure to coal and rock dust can cause COPD/emphysema in some susceptible individuals. *Id*. The administrative law judge permissibly found, however, that even if smoking is the "predominant" cause of claimant's emphysema, Dr. Houser did not adequately explain why claimant's significant history of coal mine dust exposure was a not factor. *See Kennard*, 790 F.3d at 668; *Barrett*, 478 F.3d

at 356; *Rowe*, 710 F.2d at 255; Decision and Order at 28; Director's Exhibit 13 at 5. Thus the administrative law judge rationally found Dr. Houser's opinion insufficient to disprove legal pneumoconiosis.[6] Decision and Order at 28; Director's Exhibit 13. Because the administrative law judge rationally discredited the opinions of Drs. Tuteur and Houser,[7] the only medical opinions supportive of employer's burden, we affirm his finding employer did not disprove legal pneumoconiosis. We therefore affirm the administrative law judge's determination employer did not rebut the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Total Disability Causation

The administrative law judge next addressed whether employer rebutted the Section 411(c)(4) presumption by proving "no part" of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 31-32. The administrative law judge rationally found the same reasons undercutting the opinions of Drs. Tuteur and Houser on the issue of legal pneumoconiosis also undercut their opinions that claimant's disabling respiratory impairment is not caused by the disease. *Kennard*, 790 F.3d at 668; *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 30-31. Moreover, employer does not challenge this determination on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm the administrative law judge's finding that employer failed to rebut disability causation. *See* 20 C.F.R. §718.305(d)(1)(ii).

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[6] Employer also asserts the administrative law judge erred in failing to make a specific smoking history determination. Employer's Brief at 8-10. As discussed, *supra*, however, all of the physicians of record agreed that cigarette smoking contributed to claimant's impairment. The dispute is whether coal mine dust was also a contributing factor. As we have affirmed the administrative law judge's discrediting of Drs. Tuteur and Houser because they did not adequately explain why coal mine dust exposure did not contribute along with smoking to claimant's impairment, error if any in the administrative law judge's failure to make a specific smoking history finding is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).

[7] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Tuteur and Houser, we need not address employer's remaining arguments regarding the weight accorded to their legal pneumoconiosis opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

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