U.S. Department of Labor

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

BRB No. 19-0039 BLA

DANNY R. DORTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
POWELL MOUNTAIN COAL COMPANY	)	
	)	DATE ISSUED: 09/27/2019
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-BLA-05412) of Administrative Law Judge Paul R. Almanza rendered on a claim filed pursuant to the

Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves claimant's request for modification of a claim filed on April 24, 2013.[1]

The administrative law judge found claimant established at least 25.85 years of underground coal mine employment and a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2). Thus, he determined 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).[2] The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer challenges the administrative law judge's finding it did not rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

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

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[1] On June 25, 2013, the district director issued a Proposed Decision and Order Abandonment of Claim, finding claimant failed to respond to a May 21, 2013 Order to Show Cause. Director's Exhibit 19. Claimant submitted a request for his claim to be refiled on September 26, 2013. Director's Exhibit 20. In response, the district director informed claimant his request would be considered a request for modification of the denial by reason of abandonment. Director's Exhibit 21. On December 2, 2013, the district director issued a Proposed Order to Show Cause Granting Request for Modification. Director's Exhibit 22. On January 8, 2014, the district director issued a Proposed Decision and Order Granting Request for Modification. Director's Exhibit 24. Employer timely appealed.

[2] 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); 20 C.F.R. §718.305(b).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 25.85 years of underground coal mine employment and a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) and thus 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 4, 22-23.

evidence, and in accordance with applicable law.[4] 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 clinical nor legal pneumoconiosis[5] 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)(i), (ii). The administrative law judge found employer failed to establish rebuttal by either method.[6]

To disprove legal pneumoconiosis, employer must establish 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 Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered the opinions of Drs. Fino and McSharry, who opined claimant suffers from an obstructive impairment due to causes other than coal mine dust.[7] Decision and Order at 20-24;

[4] Because claimant's coal mine employment was in Virginia, 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); Director's Exhibits 3, 12.

[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). This definition encompasses 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). 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 determined employer rebutted the existence of clinical pneumoconiosis, but did not rebut the existence of legal pneumoconiosis. Decision and Order at 19; *see* 20 C.F.R. §718.305(d)(1)(i).

[7] The administrative law judge also considered Dr. Littner's opinion that claimant's obstructive respiratory impairment is due to a combination of smoking and coal dust exposure. Decision and Order at 20; Director's Exhibit 12. The administrative law judge concluded Dr. Littner's opinion is not sufficient to establish legal pneumoconiosis and

Employer's Exhibits 9-12. Employer argues the administrative law judge erred in finding their opinions not well reasoned. Employer's Brief at 5-12. We disagree.

Contrary to employer's contention, the administrative law judge did not improperly require Dr. Fino to "rule out" coal mine dust as a cause of claimant's respiratory impairment. *See* Employer's Brief at 6. Rather, the administrative law judge correctly recognized that, in order to rebut the presumption, employer must disprove the existence of legal pneumoconiosis. Decision and Order at 17, 19-20. He found Dr. Fino's opinion not credible based on the physician's own reasons for why *he* believed claimant's lung disease was in no way related to coal mine dust exposure. *Id.* at 20-23; *see* Employer's Exhibits 9 at 9, 13; 11 at 17, 20.

The administrative law judge also accurately found Dr. Fino relied, in part, on the absence of radiographic evidence of pneumoconiosis in opining that claimant's pulmonary condition was not related to coal mine dust exposure.[8] Decision and Order at 22; Employer's Exhibits 9, 11 at 15-16. The administrative law judge permissibly found this reasoning inconsistent with the definition of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311-12 (4th Cir. 2012); *see also* 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000) (coal mine dust can cause clinically significant obstructive lung disease, even in the absence of x-ray evidence of clinical pneumoconiosis).

The administrative law judge also permissibly discredited the opinions of Drs. Fino and McSharry because neither doctor adequately explained how they eliminated claimant's 25.85 years of coal mine dust exposure as a significant contributor or aggravator to his chronic obstructive lung disease. *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013) (affirming discrediting of physicians who provided inadequate and unconvincing reasons for why the miner's disabling interstitial fibrosis was not significantly related to or substantially aggravated by his coal mine dust exposure); *Looney*, 678 F.3d at 313-14; Decision and Order at 24.

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noted that, regardless, it is employer's burden to disprove the disease. Decision and Order at 20.

[8] In explaining how to differentiate between emphysema due to smoking or to coal dust exposure, Dr. Fino testified that two physicians, Drs. Leigh and Ruckley, whose work was cited in the preamble to the 2001 regulations, found "more emphysema due to coal mine dust correlated with more coal content in the lungs seen under the microscope, and actually, with clinical pneumoconiosis." Employer's Exhibit 11 at 15; *see* 65 Fed. Reg. 79,920, 79,942 (Dec. 20, 2000).

Because the administrative law judge permissibly discredited the opinions of Drs. Fino and McSharry,[9] we affirm his finding that employer failed to establish claimant does not have legal pneumoconiosis, precluding a rebuttal finding that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether employer rebutted the Section 411(c)(4) presumption by establishing that "no part of [claimant'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)(ii). Contrary to employer's contention, he again rationally discounted the opinions of Drs. Fino and McSharry that claimant's disability is not due to pneumoconiosis because neither doctor diagnosed legal pneumoconiosis, contrary to his finding.[10] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (doctor who fails to diagnose pneumoconiosis cannot be credited on disability causation absent "specific and persuasive reasons" and at most can be given "little weight"); *see also Big Branch Res., Inc. v. Ogle*, 737 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 25. Therefore, we affirm the administrative law judge's determination employer failed to prove that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis.[11] *See* 20 C.F.R. §718.305(d)(1)(ii).

[9] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Fino and McSharry, any error in discrediting their opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight he accorded their opinions.

[10] Neither doctor expressed an opinion on disability causation independent of his belief that the miner did not have legal pneumoconiosis. *See* Employer's Exhibits 9-12.

[11] Employer does not contend the administrative law judge's granting claimant's modification request fails to render justice under the Act. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255-56 (1971); *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68, 72 (1999).

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