U.S. Department of Labor

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

BRB No. 19-0350 BLA

DICKIE K. RATLIFF Claimant-Respondent v. HAWKINS COAL COMPANY and EMPLOYERS INSURANCE OF WAUSAU, c/o LIBERTY MUTUAL INSURANCE GROUP Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/27/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

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

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer/carrier.

Kathleen H. Kim (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: ROLFE, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its carrier (employer) appeal the Decision and Order Awarding Benefits (2017-BLA-06230) of Administrative Law Judge Larry A. Temin rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on February 25, 2016.

The administrative law judge found claimant had at least fifteen years of coal mine employment in conditions substantially similar to those in an underground mine and a totally disabling respiratory or pulmonary impairment. He therefore found 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).[1] The administrative law judge found employer did not rebut the presumption and awarded benefits.

On appeal, employer summarily contends that Section 1556 of the Patient Protection and Affordable Care Act, which revived the Section 411(c)(4) presumption, "violates Article II of the United States Constitution." Employer's Brief at 2; Pub. L. No. 111-148, §1556 (2010). On the merits of entitlement, employer argues the administrative law judge erred in finding it did not rebut the presumption. Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs (the Director), in a limited response, urges the Board to decline to entertain employer's unidentified and unsupported constitutional objection.

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.[2] 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, 362 (1965).

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis when the evidence establishes at least fifteen years of underground or substantially similar 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.

[2] Because the miner's last coal mine employment occurred in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 12; Hearing Transcript at 30.

Constitutionality of Section 411(c)(4)

As a threshold matter, we agree with the Director's position that employer failed to provide any specific argument for its constitutional objection to Section 411(c)(4); it merely sets forth a one sentence, unsupported conclusion that revival of the presumption violates Article II of the U.S. Constitution. Employer's Brief at 2. The Board's procedural rules require the brief accompanying a petition for review contain "an argument with respect to each issue presented" and "a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result." 20 C.F.R. §802.211(b). Because employer's assertion does not satisfy this requirement, we decline to address it. *Id*.; *see Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

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

Because claimant invoked the presumption of total disability due to pneumoconiosis under Section 411(c)(4), the burden shifted to employer to establish claimant does not have legal or clinical pneumoconiosis,[3] 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 establish rebuttal by either method.[4] Decision and Order at 13-14.

Employer initially challenges the administrative law judge's finding it did not rebut legal pneumoconiosis. To disprove legal pneumoconiosis, employer must establish that 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).

[3] "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).

[4] The administrative law judge found employer rebutted the existence of clinical pneumoconiosis, but not legal pneumoconiosis. Decision and Order at 17-18.

The administrative law judge considered Dr. Rosenberg's opinion.[5] Decision and Order at 17-18; Director's Exhibit 23; Employer's Exhibit 2. Dr. Rosenberg examined claimant and reviewed claimant's medical records. He opined claimant does not have clinical or legal pneumoconiosis, but has moderate to severe restriction and "significant ventilatory impairment" due to his obesity and cardiomegaly, with no contribution by coal dust. Director's Exhibit 23; Employer's Exhibit 2.

Employer argues the administrative law judge erred in finding Dr. Rosenberg required x-ray evidence of clinical pneumoconiosis to diagnose legal pneumoconiosis. Employer's Brief at 4. We disagree. Dr. Rosenberg stated that if claimant's qualifying spirometric measurements were related to coal mine dust exposure, "he would have advanced micronodular abnormalities and parenchymal changes radiographically." Director's Exhibit 23 at 2; Employer's Exhibit 2 at 2. Thus, the administrative law judge permissibly discredited Dr. Rosenberg's opinion as inconsistent with the preamble to the 2001 revised regulations, which recognize that "[d]ecrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not [clinical] pneumoconiosis is also present." 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Decision and Order at 17-18; *see A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012). Further, he permissibly discredited Dr. Rosenberg's opinion for failing to adequately explain why, even assuming claimant's obesity and cardiomegaly are the primary causes of his condition, his at least fifteen years of coal mine dust exposure did not contribute to or aggravate his impairment. *See Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020); Decision and Order at 18.

Because Dr. Rosenberg's opinion is the only opinion supportive of a finding claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's determination employer failed to disprove the existence of legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80 (6th Cir. 2011).

[5] The administrative law judge also considered the opinions of Drs. Raj and Green and noted they both support a finding of legal pneumoconiosis. Decision and Order at 18; Director's Exhibit 15, 24, 27; Claimant's Exhibit 2, 3. Because the opinions of Drs. Raj and Green do not aid employer in rebutting the presumption, we need not address employer's arguments concerning the weighing of these opinions. *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."); Employer's Brief at 3.

Employer next alleges the administrative law judge's analysis of disability causation was flawed. Employer's Brief at 4. This contention is without merit. The administrative law judge properly considered whether employer established rebuttal 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 18-20. In addition, he rationally discounted Dr. Rosenberg's opinion claimant's totally disabling respiratory impairment was not caused by pneumoconiosis because he did not diagnose pneumoconiosis, contrary to the administrative law judge's finding employer failed to disprove the presence of the disease. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 19. We therefore affirm the administrative law judge's determination employer failed to rebut the presumption that claimant's disabling respiratory impairment was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Based on our affirmance of the administrative law judge's finding that employer did not establish rebuttal of the Section 411(c)(4) presumption by either method, we further affirm the award of benefits.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge