U.S. Department of Labor

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

BRB No. 15-0283 BLA

MELVIN R. MUTTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELK RUN COAL COMPANY, INCORPORATED	)	DATE ISSUED: 04/25/2016
	)	
and	)	
	)	
A.T. MASSEY	)	
	)	
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Anne B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2012-BLA-5502) of Administrative Law Judge Theresa C. Timlin rendered on a claim

filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. as amended 30 U.S.C.§§901-944 (2012)(the Act). This case involves a claim filed on April 21, 2011. Applying Section 411(c)(4), 30 U.S.C. §921(c)(4)(2012),[1] the administrative law judge credited claimant with thirty-eight years of qualifying coal mine employment,[2] and found that the evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the Section 411(c)(4) presumption that the miner is totally disabled due to pneumoconiosis. The administrative law judge also found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in her analysis of the medical opinion evidence when she found that employer did not rebut the Section 411(c)(4) presumption, and failed to comply with the requirements of the Administrative Procedure Act (APA).[3] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[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. 33 U.S.C. §921(b)(3), as incorporated by 30

[1] Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4)(2012), provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those of an underground mine, and a totally disabling respiratory impairment are established.

[2] The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibits 3, 5. Accordingly, the Board will apply the law 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).

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

[4] Because employer does not challenge the administrative law judge's finding that invocation of the Section 411(c)(4) presumption was established, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Employer's Brief at 11, 12.

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. Employer rebuts the presumption by establishing that claimant does not have either legal or clinical pneumoconiosis,[5] 20 C.F.R. §718.305(d)(1)(i), or by establishing 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)(ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 135, BLR (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011). The administrative law judge found that employer failed to rebut the presumption by either method.

In evaluating whether employer disproved the presumption of legal pneumoconiosis,[6] the administrative law judge considered the opinions of Drs. Zaldivar and Spagnolo.[7] Dr. Zaldivar opined that claimant suffers from an impairment resulting from traumatic injury to the abdomen and chest,[8] a hiatal hernia, obesity and long-standing asthma "with progressive remodeling of the lungs," not related to coal mine employment. Decision and Order at 10-11, 19, 22-23; Employer's Exhibits 1, 9. Dr. Spagnolo opined that claimant's respiratory impairment is due to an underlying asthmatic condition, with possible underlying cardiac condition, unrelated to his coal mine

[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 respiratory or pulmonary disease or 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 found that claimant does not have clinical pneumoconiosis. *See* Decision and Order at 24.

[7] The administrative law judge noted that Dr. Klayton found that claimant's respiratory impairment was due to his coal mine dust exposure. Decision and Order at 9-10, 18-19; Director's Exhibit 10; Claimant's Exhibit 1.

[8] Claimant's medical history reflects that he fell off a house roof in 2009 and sustained abdominal and other injuries, including "herniation of the stomach in the left lower chest, as well as subsegmental atelectasis and scarring of the left lower lobe." Decision and Order at 3 & n.4, 20-21.

employment. Decision and Order at 12, 19-20; Employer's Exhibits 7, 8. The administrative law judge found, however, that the opinions of Drs. Zaldivar and Spagnolo, that claimant's respiratory impairment was unrelated to coal mine employment, were unpersuasive as they failed to adequately explain how claimant's lengthy coal mine employment history did not contribute to, or substantially aggravate his respiratory impairment. The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis.

Employer contends that the administrative law judge erred in finding that the opinions of Drs. Zaldivar and Spagnolo were insufficient to disprove the existence of legal pneumoconiosis. We disagree.

The administrative law judge permissibly found that the opinions of Drs. Zaldivar and Spagnolo were unpersuasive in excluding coal dust as a contributor to claimant's respiratory impairment because the doctors' explanations, focusing on other etiologies, failed to adequately address how the miner's coal dust exposure, during his lengthy coal mine employment, did not contribute to, or substantially aggravate, claimant's respiratory impairment.[9] Decision and Order at 22-23; *see* 20 C.F.R. §718.201(b); *see Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-19-20 (2004); *see also Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). Consequently, the administrative law judge permissibly accorded little weight to the opinions of Drs. Zaldivar and Spagnolo on the issue of legal pneumoconiosis. Decision and Order at 22-23, 28; *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, BLR (4th Cir. 2015); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Thus, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis and failed, therefore, to rebut the Section 411(c)(4) presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i).[10]

Employer next contends that the administrative law judge "engaged in no separate analysis of the disability causation issue" and, thus, "denied employer the benefit of one of the rebuttal methods." Employer's Brief at 13. We disagree. Although the

[9] Dr. Zaldivar testified that claimant had 38-40 years of coal mine employment, Employer's Exhibit 9 at 21, while Dr. Spagnolo testified that claimant had 40 years of coal mine employment. Employer's Exhibit 8 at 27.

[10] Because the administrative law judge found that employer failed to disprove the existence of legal pneumoconiosis, her finding that claimant does not have clinical pneumoconiosis cannot rebut the presumption pursuant to 20 C.F.R. §718.305(d)(1)(i)(A), (B).

administrative law judge combined her analyses of legal pneumoconiosis and disability causation in one section, she did separately analyze the two issues,[11] and specifically concluded that the opinions of Drs. Zaldivar and Spagnolo failed to persuasively establish that "no part of the totally disabling respiratory impairment is due to pneumoconiosis."[12] Decision and Order at 23; *see Bender*, 782 F.3d at 135; *Morrison*, 644 F.3d at 479-80, 25 BLR at 2-8-9. Further, we have affirmed the administrative law judge's findings that the opinions of Drs. Spagnolo and Zaldivar are not sufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 23. Consequently, we affirm the administrative law judge's finding that the opinions of Drs. Zaldivar and Spagnolo are insufficient to disprove disability causation and establish rebuttal by that means.[13] Therefore, we affirm the administrative law judge's finding that employer failed to establish that no part of claimant's total respiratory disability was caused by pneumoconiosis. *See id.*; 20 C.F.R. §718.305(d)(1)(ii); *see also Epling*, 783 F.3d at 504-05; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. As the administrative law judge's findings and analysis comport with the requirements of the APA, we affirm her finding that employer failed to rebut the Section 411(c)(4) presumption.

[11] The administrative law judge found that Dr. Zaldivar's opinion, that claimant "has plenty of other reasons" that explain the cause of his respiratory impairment, was unpersuasive, because the doctor conceded that claimant's lung trauma, asthma and obesity do not preclude a finding that claimant's respiratory impairment is related to pneumoconiosis. She made a similar finding with respect to the opinion of Dr. Spagnolo. Decision and Order at 23.

[12] Because employer bears the burden of rebutting the presumption of legal pneumoconiosis, we need not address employer's arguments regarding the weight the administrative law judge accorded to the opinion of Dr. Klayton, who found that claimant's respiratory impairment is related to his pneumoconiosis. *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 135, BLR (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011); *see also* Employer's Brief at 15-17, 26-29.

[13] A medical opinion where a physician finds, contrary to an administrative law judge's determination, that the miner has neither legal nor clinical pneumoconiosis, cannot be credited unless the administrative law judge identifies "specific and persuasive reasons for concluding that the doctor's judgment" on causation "does not rest upon her disagreement with the [administrative law judge's] finding . . . ." *See Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-384 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995).

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge