U.S. Department of Labor

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

BRB No. 14-0304 BLA

OTT KENNEDY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ITTMAN/CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 03/27/2015
	)	
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 of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

G. Todd Houck, Mullens, West Virginia, for claimant.

William S. Mattingly and Amy Jo Holley (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

HALL, Acting Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (11-BLA-5283) of Administrative Law Judge Lystra A. Harris awarding benefits on a claim filed pursuant to the provisions of

the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on October 15, 2009.[1]

Applying amended Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with at least fifteen years of qualifying coal mine employment,[3] and found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[4] The administrative law judge, therefore, found that claimant invoked the rebuttable presumption set forth at Section 411(c)(4). Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond in support of the administrative law judge's award of benefits.[5]

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[1] Claimant's previous claims, filed on July 22, 1997 and October 26, 2000, were finally denied by the district director because claimant failed to establish any element of entitlement. Director's Exhibits 1, 2.

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

[3] The record reflects that claimant's coal mine employment was in West Virginia. Hearing Transcript at 15. 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).

[4] Because the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

[5] Because they are unchallenged on appeal, we affirm the administrative law judge's findings that (1) claimant had at least fifteen years of qualifying coal mine

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 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of both legal and clinical pneumoconiosis,[6] or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1). The administrative law judge found that employer failed to establish rebuttal by either method.[7]

Initially, we address employer's contention that the administrative law judge improperly restricted employer to the two methods of rebuttal provided to the Secretary of Labor at 30 U.S.C. §921(c)(4). In support of its argument, employer relies upon the statutory language of 30 U.S.C. §921(c)(4), and the United States Supreme Court's holding in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976), that the rebuttal limitations in the Act are inapplicable to coal mine operators. Employer's Brief at 33-48. Although employer's argument was rejected by the Board in *Owens v. Mingo*

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employment; (2) the new evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2); (3) claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309; and (4) claimant invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] "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).

[7] In considering whether employer rebutted the Section 411(c)(4) presumption, the administrative law judge combined her discussion of whether employer disproved the existence of pneumoconiosis, with her discussion of whether employer proved that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Decision and Order at 15-29.

Logan Coal Co., 25 BLR 1-1 (2011), employer asserts that the United States Court of Appeals for the Fourth Circuit has not resolved this issue. Further, employer argues that the recently promulgated regulation implementing rebuttal standards derived from amended Section 411(c)(4), specifically 20 C.F.R. §718.305(d), conflicts with the holding in *Usery* and is invalid. Employer's arguments lack merit. The Fourth Circuit court has not disturbed the Board's holding in *Owens*, *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 25 BLR 2-339 (4th Cir. 2013), and employer has not provided a compelling reason for the Board to revisit this issue. Additionally, employer has not shown that it was, in fact, restricted in the evidence that it could offer in rebuttal. Lastly, we agree with the Director's position that 20 C.F.R. §718.305(d), as amended, is valid. Consequently, we reject employer's arguments to the contrary.

Employer also asserts that the administrative law judge applied an improper rebuttal standard under Section 411(c)(4), by requiring employer to rule out coal mine dust exposure as a cause of claimant's totally disabling respiratory impairment. Contrary to employer's argument, the administrative law judge correctly explained that, because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4); Decision and Order at 15-16. Moreover, the Fourth Circuit has explicitly stated that in order to meet its rebuttal burden, employer must "effectively . . . rule out" any contribution to claimant's pulmonary impairment by dust exposure in coal mine employment.[8] *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Thus, we conclude that the administrative law judge applied the correct rebuttal standard in this case.

Employer next contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis. In evaluating whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Zaldivar and Castle. Drs. Zaldivar and Castle opined that claimant's disabling obstructive pulmonary impairment is due to emphysema caused by cigarette smoking and asthma. Employer's Exhibits 2, 10, 12, 13. Drs. Zaldivar and

[8] Similarly, the regulations require the party opposing entitlement in a miner's claim to establish "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).

Castle opined that claimant's disabling obstructive pulmonary impairment was not caused by his coal mine dust exposure.[9] *Id.*

The administrative law judge discredited the opinions of Drs. Zaldivar and Castle because the physicians did not adequately explain how they determined that claimant's coal mine dust exposure did not contribute to his disabling obstructive pulmonary impairment. Decision and Order at 27-28. The administrative law judge also found that, to extent that Dr. Zaldivar relied on the absence of x-ray evidence of clinical pneumoconiosis to rule out the existence of legal pneumoconiosis, his opinion was inconsistent with the Department of Labor's recognition, as set forth in the preamble to the revised regulations, that coal mine dust can cause clinically significant obstructive lung disease, even in the absence of evidence of clinical pneumoconiosis. *Id.*

We reject employer's contention that the administrative law judge erred in her consideration of the opinions of Drs. Zaldivar and Castle. The administrative law judge permissibly questioned the opinions of Drs. Zaldivar and Castle, that claimant's disabling obstructive pulmonary impairment was due solely to smoking and asthma, because she found that the physicians failed to adequately explain how they eliminated claimant's coal dust exposure as a source of his obstructive impairment.[10] *See Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995)*; Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 28. The administrative law judge, therefore, permissibly discounted the opinions of Drs. Zaldivar and Castle.[11] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

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[9] Drs. Zaldivar and Castle also diagnosed lung cancer due to cigarette smoking. Employer's Exhibits 10, 12.

[10] The administrative law judge found that Dr. Zaldivar failed to adequately explain why claimant's "susceptibility to the negative effects of cigarette smoking excludes any susceptibility to the negative effects of coal mine dust exposure." Decision and Order at 28. The administrative law judge found that "Dr. Castle appears to presume that, because smoking and asthma are sufficient to cause the disability, coal mine dust exposure necessarily did not contribute to the disease." *Id.*

[11] Because the administrative law judge provided a valid basis for according less weight to the opinions of Drs. Zaldivar and Castle, the administrative law judge's error, if any, in according less weight to their opinions for other reasons, constitutes harmless error. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Zaldivar and Castle.

Because the opinions of Drs. Zaldivar and Castle are the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis,[12] or that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment,[13] we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1). Therefore, we affirm the administrative law judge's award of benefits. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

[12] Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1).

[13] We decline to address employer's contentions of error regarding the administrative law judge's consideration of the opinions of Drs. Rasmussen and Ranavaya, as the opinions of these physicians do not assist employer in establishing rebuttal of the Section 411(c)(4) presumption. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur in the result only.

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JUDITH S. BOGGS
Administrative Appeals Judge