U.S. Department of Labor

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

BRB No. 14-0330 BLA

TRACEY J. CARTER Claimant-Respondent v. TIMCO ENERGY, INCORPORATED and BRICKSTREET MUTUAL INSURANCE COMPANY, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/30/2015 DECISION and ORDER

Appeal of the Decision and Order of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Ann Marie Scarpino (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 (2012-BLA-5193) of Administrative Law Judge Richard T. Stansell-Gamm awarding benefits 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 a claim filed on May 25, 2010.

Applying amended Section 411(c)(4), 30 U.S.C. §921(c)(4),[1] the administrative law judge credited claimant with over thirty-seven 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 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 has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's award of benefits. In a reply brief, employer reiterates it previous contentions.[3]

[1] 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).

[2] The record indicates that claimant's coal mine employment was in Virginia and West Virginia. Director's Exhibit 3. 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).

[3] Because they are unchallenged on appeal, we affirm the administrative law judge's findings that (1) claimant has over thirty-seven years of qualifying coal mine employment; (2) the evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2); and (3) claimant invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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,[4] 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.

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 are inapplicable to coal mine operators. Employer's Brief at 19-26. Although employer's argument was rejected by the Board in *Owens v. Mingo 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 on 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.

[4] "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).

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, 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 11. 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. *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Moreover, as the administrative law judge accurately noted, 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). 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 established that claimant does not have legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Castle and Fino. Dr. Castle opined that claimant is totally disabled due to "bronchial asthma and tobacco smoke induced airway obstruction." Director's Exhibit 14; Employer's Exhibit 8 at 24. Dr. Castle opined that claimant does not suffer from a pulmonary disease caused by his coal mine dust exposure. Employer's Exhibit 8 at 33. Dr. Fino opined that claimant suffers from a totally disabling obstructive pulmonary impairment due entirely to smoking. Employer's Exhibit 1, 9.

In evaluating whether the evidence disproved the existence of legal pneumoconiosis, the administrative law judge accorded less weight to the opinions of Drs. Castle and Fino, that claimant does not suffer from legal pneumoconiosis, because he found that the doctors failed to adequately explain how they eliminated claimant's thirty-seven years of coal mine dust exposure as a contributor to claimant's disabling obstructive pulmonary impairment. Decision and Order at 22-23. The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Castle and Fino. We disagree. The administrative law judge noted that Drs. Castle relied, in part, on the partial reversibility of claimant's impairment after bronchodilator administration to determine that coal mine dust exposure was not a cause

of claimant's obstructive impairment.[5] Decision and Order at 22. The administrative law judge found, as was within his discretion, that Dr. Castle did not adequately explain why the irreversible portion of claimant's obstructive pulmonary impairment[6] was not due, in part, to coal mine dust exposure or why claimant's response to bronchodilators necessarily eliminated a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 22.

The administrative law judge further found that Dr. Fino's opinion, that claimant's disabling obstructive impairment is unrelated to coal mine dust exposure, is inconsistent with scientific studies approved by the Department of Labor (DOL) in the preamble to the 2001 amended regulations. Dr. Fino eliminated coal dust exposure as a source of claimant's obstructive pulmonary impairment, in part, because he found a disproportionate decrease in claimant's FEV1 compared to his FVC, a characteristic that he found inconsistent with a coal mine dust-induced lung disease.[7] The administrative law judge noted, however, that scientific evidence endorsed by the DOL recognizes that coal dust exposure can cause a significant decrease in a miner's FEV1/FVC ratio. Decision and Order at 23-24; *see* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000) (finding that coal dust can cause clinically significant obstructive disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV1/FVC ratio). Consequently, the administrative law judge permissibly discounted Dr. Fino's opinion as to the cause of claimant's disabling obstructive pulmonary impairment, because the doctor relied on an assumption that is contrary to the medical science credited by the DOL. *See J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Lewis Coal Co. v. Director, OWCP* [*McCoy*], 373 F.3d 570, 578, 23 BLR 2-184, 2-190 (4th Cir. 2004).

[5] Dr. Castle opined that coal mine dust exposure causes a "mixed, irreversible, obstructive and restrictive ventilatory impairment." Employer's Exhibit 8 at 22-23.

[6] As the administrative law judge accurately noted, each of the four pulmonary function studies of record produced qualifying results both before and after the administration of a bronchodilator. Decision and Order at 8-9; Director's Exhibits 10, 14; Claimant's Exhibit 9; Employer's Exhibit 1. Although Dr. Castle interpreted some of the pulmonary function studies as showing significant reversibility, he did not address the significance of the residual disabling impairment remaining after the administration of a bronchodilator. Director's Exhibit 14; Employer's Exhibit 8.

[7] Dr. Fino opined that a reduced FEV1/FVC ratio is consistent with an obstruction caused by smoking, while a "proportionate" reduction in the FEV1/FVC ratio is more consistent with an impairment due to coal mine dust exposure. Employer's Exhibit 1.

Because the administrative law judge permissibly discredited the opinions of Drs. Castle and Fino, we affirm his finding that employer failed to disprove the existence of legal pneumoconiosis. Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that the miner did not suffer from pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Accordingly, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.

Upon finding that employer was unable to disprove the existence of pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge rationally discounted the opinions of Drs. Castle and Fino, that the miner's disabling pulmonary impairment was not caused by pneumoconiosis, because Drs. Castle and Fino did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove legal pneumoconiosis. *See Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 24. Therefore, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by proving that claimant's totally disabling impairment did not arise out of, or in connection with his coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(ii); *see Rose* 614 F.2d at 939, 2 BLR at 2-43.

Because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge's award of benefits is affirmed.

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