U.S. Department of Labor

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

BRB No. 17-0427 BLA

CLAUDE D. DUNCAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	
and	)	
	)	
PITTSTON COMPANY	)	DATE ISSUED: 05/24/2018
	)	
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05239) of Administrative Law Judge Natalie A. Appetta rendered 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 miner's claim filed on October 29, 2013.

The administrative law judge credited claimant with at least 19.48 years of qualifying coal mine employment, based on the parties' stipulation, and found that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), thereby entitling claimant to invoke the Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis.[1] The administrative law judge further found that employer failed to rebut the presumption and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant did not file a response brief in this appeal. The Director, Office of Workers' Compensation Programs, responds in support of the award of benefits.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant establishes 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); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least 19.48 years of qualifying coal mine employment; the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b); and invocation of the Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v.*

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

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis,[4] or 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)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

In order to rebut the presumed existence of legal pneumoconiosis, employer must show that claimant does not suffer from 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). Relevant to the existence of legal pneumoconiosis[5] the administrative law judge considered the opinions of Drs. Sargent,

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Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 11-12.

[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 is defined as "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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1).

[5] Because employer concedes that it cannot disprove that claimant has clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B), that finding is affirmed. *See Skrack*, 6 BLR at 1-711; Decision and Order at 32; Employer's Brief at 4. We therefore need not address employer's contention that the administrative law judge erred in finding the December 3, 2013 x-ray to be positive for clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 4. Employer's failure to disprove the existence of clinical pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis, 20 C.F.R. §718.305(d)(1)(i), and ordinarily would obviate the need to consider the administrative law judge's findings on the issue of legal pneumoconiosis. We will address employer's arguments on this issue, however, as the

Fino, and Ajjarapu.[6] Drs. Sargent and Fino opined that claimant does not have legal pneumoconiosis but suffers from asthma that is unrelated to coal dust exposure.[7] Decision and Order at 12-18, 33-36; Director's Exhibit 13; Employer's Exhibits 1-3. Dr. Ajjarapu diagnosed legal pneumoconiosis.[8] Director's Exhibit 12. The administrative law judge discounted the opinions of Drs. Sargent and Fino as inadequately explained. Decision and Order at 33, 35. In contrast, the administrative law judge found the opinion of Dr. Ajjarapu to be well-reasoned and documented and entitled to greater weight. *Id.* at 33, 36.

Employer contends that the administrative law judge failed to provide adequate reasons for discrediting the opinions of Drs. Sargent and Fino. Employer's Brief at 4-13. We disagree. The administrative law judge noted that both Dr. Sargent and Dr. Fino diagnosed claimant with asthma, a condition they stated is not caused by coal dust exposure based, in part, on the reversible pattern of his impairment. Decision and Order at 33-34; Employer's Exhibits 1 at 2; 2 at 7-8, 12; 3 at 6-8, 12. Both physicians stated that although claimant's impairment is not completely reversible, this did not undermine their diagnoses of asthma because a severe or undertreated asthmatic may develop airway obstruction which is only partially reversible, through the process of airway remodeling. Decision and Order at 33, 35; Employer's Exhibits 1 at 2; 2 at 7-8, 18-19; 3 at 7; 4 at 3.

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administrative law judge's legal pneumoconiosis findings affected his disability causation findings.

[6] The administrative law judge also considered the opinion of Dr. Owens and the treatment records of Dr. Robinette, but correctly found that neither provided an opinion on the issue of legal pneumoconiosis. Decision and Order at 33, 36; Claimant's Exhibit 4; Director's Exhibit 13.

[7] Dr. Sargent diagnosed a partially reversible airway obstruction due to a long-standing history of asthma. Employer's Exhibit 1. Based on his examination of claimant on February 25, 2015, Dr. Fino initially diagnosed an "obstruction and restriction with essentially no bronchodilator response" that he attributed to clinical pneumoconiosis and severe emphysema. Director's Exhibit 13. Upon review of Dr. Sargent's testing on July 5, 2016, which Dr. Fino interpreted as indicating "an improvement in diffusing capacity and oxygenation" with exertion, Dr. Fino attributed claimant's obstructive pulmonary impairment to asthma unrelated to coal dust exposure. Employer's Exhibit 2 at 17.

[8] Dr. Ajjarapu examined claimant on behalf of the Department of Labor and diagnosed chronic bronchitis with severe impairment due to coal mine dust exposure and smoking. Director's Exhibit 12.

Contrary to employer's argument, in light of the definition of legal pneumoconiosis, the administrative law judge permissibly discounted the opinions of Drs. Sargent and Fino, because she found that they failed to adequately explain how they concluded that claimant's over nineteen years of coal dust exposure did not contribute to, or aggravate, his obstructive pulmonary impairment. *See* 20 C.F.R. §718.201(b) (including within legal pneumoconiosis "any chronic . . . respiratory or pulmonary impairment significantly related to or substantially aggravated by, dust exposure in coal mine employment"); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); Decision and Order at 33. Specifically, the administrative law judge permissibly found that neither Dr. Sargent nor Dr. Fino adequately discussed why the irreversible component of claimant's obstructive impairment is due entirely to airway remodeling, or why coal mine dust exposure could not have been a contributory factor. *See Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *see also Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; Decision and Order at 34-36. As the administrative law judge provided a valid basis for discrediting the opinions of Drs. Sargent and Fino, these findings are affirmed. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

There is also no merit to employer's contention that the administrative law judge erred in crediting Dr. Ajjarapu's opinion. Employer's Brief at 13-15. The administrative law judge determined that while Dr. Ajjarapu is not a pulmonologist, she has experience in the area of Black Lung disease and her diagnosis of legal pneumoconiosis is reasoned and documented and consistent with her physical examination results and the objective testing she performed. Decision and Order at 31, 32-33. The administrative law judge therefore permissibly found Dr. Ajjarapu's opinion entitled to greater weight than the opinions of Drs. Sargent and Fino.[9] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order at 36.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their

[9] Employer argues that the administrative law judge failed to adequately consider the physician's qualifications. Employer's Brief at 14-15. Contrary to employer's argument, the administrative law judge acknowledged that Drs. Sargent and Fino possess superior qualifications to Dr. Ajjarapu, but was not required to defer to their opinions as she found them not sufficiently explained. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998); Decision and Order at 31.

diagnoses, and assign those opinions appropriate weight. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 25 BLR 2-255 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-129-30 (4th Cir. 2012); 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis and rebut the presumption pursuant to 20 C.F.R. §718.305(d)(1)(i). *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015).

Finally, the administrative law judge addressed whether employer established the second method of rebuttal by showing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge rationally determined that the opinions of Drs. Sargent and Fino are not credible because they did not diagnose pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the presence of pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05; 25 BLR 2-713, 720-21 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); Decision and Order at 37-38. We therefore affirm the administrative law judge's finding that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, claimant has established his entitlement to benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge