U.S. Department of Labor

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

BRB No. 16-0001 BLA

OBIE C. PARRISH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTHERN EDGE, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COALWORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 09/30/2016
	)	
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 of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting 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 (11-BLA-6263) of Administrative Law Judge Theresa C. Timlin 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 20, 2010.[1]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with at least twenty 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). The administrative law judge, therefore, found that claimant invoked the rebuttable presumption set forth at Section 411(c)(4).[4] The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

[1] Claimant filed two previous claims in 2001 and 2009. Director's Exhibits 1, 2. The district director denied claimant's most recent prior claim on August 31, 2009, because the evidence did not establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b). Director's Exhibit 2.

[2] Section 411(c)(4) of the Act 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) (2012); *see* 20 C.F.R. §718.305.

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

[4] Because the new 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 found that claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).

On appeal, employer argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer did not rebut the presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's contention that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2).[5]

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).

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

Employer argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer specifically contends that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[6]

In considering whether the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Shamma-Othman, Zaldivar, and Castle. Dr. Shamma-Othman opined that claimant suffers from a severe pulmonary impairment that would prevent him from returning to his previous coal mining job. Director's Exhibit 14; Employer's Exhibit 3 at 35. Dr. Zaldivar also opined that claimant is totally disabled from a pulmonary standpoint. Director's Exhibit 27; Employer's Exhibit 18 at 25. Dr. Castle opined that, based upon "the most contemporaneous physiologic studies," claimant retains the respiratory capacity to perform his previous coal mine employment. Employer's Exhibit 1. However, Dr. Castle further opined that, because of the variable

[5] Because employer does not challenge the administrative law judge's finding that claimant established at least twenty years of qualifying coal mine employment, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] The administrative law judge found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 8-11.

nature of the objective evidence, it was "entirely possible" that claimant was disabled as a whole man because of tobacco smoke-induced airway obstruction with an asthmatic component. Employer's Exhibits 1, 19.

In weighing the new medical opinion evidence, the administrative law judge found that Dr. Zaldivar's opinion that claimant is totally disabled from a pulmonary standpoint was well-reasoned and entitled to significant probative weight. Decision and Order at 17. By contrast, the administrative law judge found that Dr. Castle's opinion regarding the extent of claimant's pulmonary disability was equivocal and entitled to little probative weight. *Id.* The administrative law judge, therefore, found that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[7] *Id.* at 18.

Employer contends that the administrative law judge erred in finding that Dr. Castle's opinion regarding the extent of claimant's pulmonary impairment was equivocal. Employer's Brief at 7. We disagree. Although the administrative law judge noted that Dr. Castle opined that claimant's most recent objective studies supported a finding that claimant retains the respiratory capacity to perform his previous coal mine employment, the administrative law judge accurately noted that the doctor also opined that it was possible that claimant was disabled as a whole man because of tobacco smoke-induced airway obstruction with an asthmatic component. Decision and Order at 17; Employer's Exhibits 1, 19. The administrative law judge properly found that this latter opinion is supportive of a finding that claimant is totally disabled from a pulmonary perspective. *Id.* Given Dr. Castle's conflicting statements, the administrative law judge permissibly found his opinion to be equivocal. *See Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-117 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order at 25. Moreover, we affirm, as unchallenged on appeal, the administrative law judge's determination that Dr. Zaldivar's opinion that claimant is totally disabled from a pulmonary standpoint is well-reasoned and entitled to significant probative weight. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and

[7] The administrative law judge accorded "less weight" to Dr. Shamma-Othman's opinion that claimant was prevented from returning to his coal mine employment from a pulmonary standpoint, because she found that the doctor did not demonstrate an adequate understanding of the exertional requirements of claimant's coal mine employment. Decision and Order at 16-17. However, because she found that Dr. Shamma-Othman's opinion was "consistent with the overall objective medical evidence," the administrative law judge found that Dr. Shamma-Othman's opinion was entitled to "moderate probative weight." *Id.* at 17.

Order at 17. Because it is based upon substantial evidence,[8] we affirm the administrative law judge's finding that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Moreover, the administrative law judge properly weighed the medical opinion evidence with the pulmonary function and blood gas study evidence, and found that, when weighed together, the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order on 18. This finding is, therefore, affirmed.[9]

In light of our affirmance of the administrative law judge's findings that claimant established over twenty years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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 rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,[10] 20 C.F.R.

[8] Employer contends that the administrative law judge erred in her consideration of Dr. Shamma-Othman's opinion. Employer, however, has not set forth a reason that this case should be remanded for further consideration of total disability. Even if we assume that the administrative law judge erred in her consideration of Dr. Shamma-Othman's medical opinion, there is no need to remand this case because the outcome is foreordained, on this record as weighed by the administrative law judge. *Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 249, 19 BLR 2-123, 2-133 (6th Cir. 1995) ("If the outcome of a remand is foreordained, we need not order one.").

[9] In light of our affirmance of the administrative law judge's finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), we also affirm her determination that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

[10] "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

§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). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer 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 opinions of Drs. Shamma-Othman, Zaldivar, and Castle. Dr. Shamma-Othman diagnosed chronic obstructive pulmonary disease (COPD). Director's Exhibit 14. Dr. Shamma-Othman opined that claimant's obstructive pulmonary impairment was "mainly" due to cigarette smoking. Employer's Exhibit 3 at 36. Dr. Zaldivar diagnosed emphysema, which he attributed entirely to cigarette smoking. Director's Exhibit 27. Dr. Castle opined that claimant suffers from mild to moderate airway obstruction due to tobacco smoking, with an asthmatic component. Employer's Exhibit 1. Drs. Zaldivar and Castle opined that claimant does not suffer from legal pneumoconiosis. Director's Exhibit 27; Employer's Exhibit 1.

The administrative law judge accorded less weight to Dr. Shamma-Othman's opinion because she found that the doctor based her opinion on an assumption contrary to the regulations, i.e., that pneumoconiosis does not cause obstructive lung disease. Decision and Order at 37-38. The administrative law judge also 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. *Id.* at 38-39. The administrative law judge additionally found that Dr. Zaldivar's reasoning was at odds with the recognition that pneumoconiosis is a latent and progressive disease, and found that Dr. Castle improperly relied upon evidence that is not in the record. *Id.* at 38-39.

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/or asthma because she found that the physicians failed to adequately explain how they eliminated claimant's

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that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

coal dust exposure as a source of his disabling obstructive impairment.[11] *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015). Because the regulations defining pneumoconiosis provide that legal pneumoconiosis encompasses respiratory and pulmonary diseases and impairments significantly related to, or substantially aggravated by, dust exposure in a coal mine, it was within the discretion of the administrative law judge to determine whether the doctors adequately addressed whether coal mine dust had substantially aggravated claimant's respiratory or pulmonary impairment. The administrative law judge, therefore, acted within her discretion in discounting the opinions of Drs. Zaldivar and Castle.[12] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Because the administrative law judge permissibly discredited the opinions of Drs. Zaldivar and Castle,[13] we affirm her finding that employer failed to establish that

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[11] The administrative law judge found that while Dr. Zaldivar opined that claimant's emphysema was due to cigarette smoking, he "did not explain why coal mine dust exposure could not have aggravated [c]laimant's pulmonary condition." Decision and Order at 38. The administrative law judge noted that Dr. Castle did not cite to any medical literature in support of his opinion that claimant's variable pulmonary function study results supported a finding that claimant's obstructive impairment was due solely to cigarette smoking. *Id.* at 39. The administrative law judge further found that Dr. Castle "failed to explain why [c]laimant's many years of coal mine employment could not have aggravated [c]laimant's obstructive impairment." *Id.* at 39.

[12] 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. Moreover, because it is unchallenged on appeal, we affirm the administrative law judge's finding that Dr. Shamma-Othman's opinion is insufficient to establish that claimant does not suffer from legal pneumoconiosis. *Skrack*, 6 BLR at 1-711.

[13] Employer argues that the administrative law judge erred by requiring Drs. Zaldivar and Castle to "rule out" the existence of legal pneumoconiosis in order to rebut the Section 411(c)(4) presumption. Employer's Brief at 22-26. We disagree. A review of the administrative law judge's Decision and Order reflects that the administrative law judge correctly stated that employer bore the burden of establishing that claimant does

claimant does not have legal pneumoconiosis. Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.[14] *See* 20 C.F.R. §718.305(d)(1)(i).

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 the miner'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. Zaldivar and Castle that claimant's pulmonary impairment was not caused by pneumoconiosis because Drs. Zaldivar and Castle did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 41. Therefore, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by proving that the miner'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).

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.

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not have pneumoconiosis. Decision and Order at 21; *see* 20 C.F.R. §718.305(d)(1)(i). Moreover, the administrative law judge did not reject the opinions of Drs. Zaldivar and Castle as insufficient to meet a "rule out" standard on the existence of legal pneumoconiosis. Rather, she found that their opinions on the existence of legal pneumoconiosis were not credible, because they did not adequately explain their opinions. Decision and Order at 38-39.

[14] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Thus, we need not address employer's contentions of error regarding the administrative law judge's finding that employer also failed to disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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