U.S. Department of Labor

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

BRB No. 16-0062 BLA

EUGENE P. OSBORNE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LIBERTY BELL FUEL INCORPORATED	)	
	)	
and	)	
	)	
WV CWP FUND	)	DATE ISSUED: 09/26/2016
	)	
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 Awarding Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-05252) of Administrative Law Judge Adele Higgins Odegard rendered on a miner's 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 12, 2010.[1]

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with at least fifteen years of qualifying coal mine employment, as the parties stipulated to seventeen years of coal mine employment, with at least fifteen of those years spent working underground. As employer also stipulated to the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4). The administrative law judge further found that employer did not rebut the Section 411(c)(4) presumption, and that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c)(2). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that employer did not establish rebuttal of the Section 411(c)(4) presumption, arguing

[1] Claimant filed a previous claim on May 13, 1999. Director's Exhibit 1. In a Decision and Order issued on September 25, 2000, Administrative Law Judge Jeffrey Tureck denied the claim, finding the evidence insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a). *Id.* By Decision and Order issued September 14, 2001, the Board affirmed Judge Tureck's denial of benefits. *Osborne v. Teays, Inc.*, BRB No. 01-0117 BLA (Sept. 14, 2001)(unpub.). Claimant filed a request for modification on October 26, 2001, and Administrative Law Judge Richard T. Stansell-Gamm denied modification on November 4, 2004. *Id.* By Decision and Order issued May 30, 2007, the Board affirmed the denial of benefits. *Osborne v. Peach Tree Coal, Inc.*, BRB No. 06-0810 BLA (May 30, 2007)(unpub.). Claimant took no further action until filing his current claim on October 12, 2010.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where 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 are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

that the medical opinion of Dr. Fino, as supported by the opinion of Dr. Zaldivar, is sufficient to rebut the presumption. Claimant has not responded in this appeal. The Director, Office of Workers' Compensation Programs, did not file a substantive brief in this appeal.[3]

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.[4] 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 Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis, or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §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 and, thus, denied benefits. Decision and Order at 20, 24, 25.

Employer contends that the administrative law judge erred in finding that employer failed to disprove the existence of legal pneumoconiosis.[5] In determining

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings of at least fifteen years of qualifying coal mine employment, the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), invocation of the Section 411(c)(4) presumption, and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

[4] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibits 1, 4. 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).

[5] The administrative law judge found that the x-ray evidence and medical opinion evidence of record establish the existence of clinical pneumoconiosis and, therefore, employer failed to rebut the presumed fact of clinical pneumoconiosis. Decision and Order at 9, 19-20. Because neither party challenges this finding, it is affirmed. *See Skrack*, 6 BLR at 1-711.

whether employer disproved the existence of legal pneumoconiosis,[6] the administrative law judge considered the medical opinions of employer's experts, Drs. Zaldivar and Fino, that claimant suffers from an obstructive impairment due solely to cigarette smoking.[7] Employer's Exhibits 5, 6. Dr. Zaldivar opined that claimant does not suffer from legal pneumoconiosis, but that he has the history and symptoms characteristic of a person with a lifelong exposure to cigarette smoke.[8] Employer's Exhibit 5. Dr. Fino similarly opined that claimant does not suffer from legal pneumoconiosis, but has severe chronic obstructive pulmonary disease (COPD) and severe pulmonary emphysema due to

[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). 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).

[7] While noting that she was not required to consider the evidence supportive of claimant's position, the administrative law judge nonetheless considered the opinions of Drs. Forehand, Wolfe, and Klayton, that claimant suffers from legal pneumoconiosis. Decision and Order at 22-24. Because each of these physicians relied on a smoking history significantly lower than the administrative law judge's finding of thirty-four pack years of smoking, the administrative law judge accorded their opinions diminished weight on that basis. *Id*. at 22-23. The administrative law judge additionally accorded the opinion of Dr. Forehand little probative weight because he is not a Board-certified pulmonologist and he did not explain how the underlying documentation supported his opinion. *Id*. at 23. Similarly, the administrative law judge accorded the opinion of Dr. Wolfe diminished probative weight because he did not adequately explain the bases for his conclusion. *Id*. The administrative law judge accorded the opinion of Dr. Klayton "moderate probative weight[,]" finding that the opinion was well reasoned and well documented, but that it was based on an inaccurate smoking history. *Id.* at 23-24.

[8] Dr. Zaldivar opined that claimant's chronic obstructive pulmonary disease [COPD] is due to claimant's lengthy smoking history and childhood exposure to secondhand smoke. Employer's Exhibit 5. Specifically, Dr. Zaldivar stated that persons with such a long-term exposure are "very likely to develop very severe COPD, as [claimant] has, regardless of the occupation." *Id*. In conclusion, Dr. Zaldivar opined that claimant is unable to perform his usual coal mine employment from a pulmonary standpoint, and that the impairment is due entirely to smoking and not coal dust exposure. *Id*.

cigarette smoking.[9] Employer's Exhibit 6.

The administrative law judge accorded little weight to the opinions of Drs. Zaldivar and Fino, finding that they were not well reasoned because they were both inconsistent with the preamble to the 2001 revised regulations and inadequately explained. Decision and Order at 20-22. Therefore, the administrative law judge determined that the opinions of Drs. Zaldivar and Fino did not disprove the presumed facts of legal pneumoconiosis and disability causation. *Id.* at 22, 24.

Employer contends that the administrative law judge erred in finding that it failed to establish rebuttal of the Section 411(c)(4) presumption, arguing that the opinion of Dr. Fino, as corroborated by the opinion of Dr. Zaldivar, is not contrary to the preamble or regulations but, rather, is well reasoned and should have been credited. Employer's Brief at 4-17. We disagree.

The administrative law judge permissibly discounted Dr. Zaldivar's opinion, as she found that the physician, in attributing claimant's disabling COPD solely to his lifelong exposure to cigarette smoke, failed to adequately explain how he eliminated claimant's more than seventeen years of coal mine dust exposure as a contributing or aggravating cause of the COPD. Decision and Order at 20-21; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *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).

Moreover, the administrative law judge found that, in diagnosing an obstructive impairment caused by smoking, Dr. Zaldivar did not "address the additive effect of coal mine dust on [claimant's] condition." Decision and Order at 21. Noting that the preamble to the revised regulations acknowledges the prevailing view of the medical community that the risks associated with smoking and coal mine dust exposure are additive, the administrative law judge permissibly discredited the opinion of Dr. Zaldivar

[9] Dr. Fino diagnosed severe COPD and severe pulmonary emphysema due to cigarette smoking, but opined that claimant does not suffer from legal pneumoconiosis. Employer's Exhibit 6. Dr. Fino stated that cigarette smoking can cause an interstitial lung disease which presents on x-ray as both pulmonary fibrosis and emphysema, and may show as a combined obstructive and restrictive impairment. *Id*. Dr. Fino concluded that claimant, from a pulmonary standpoint, is disabled from returning to his usual coal mine employment, and that this disabling respiratory impairment is due to cigarette smoking. *Id*. Dr. Fino further stated that, even if he were to assume the presence of coal workers' pneumoconiosis, it did not contribute to claimant's disability. *Id*.

because the physician did not adequately explain why claimant's coal mine dust exposure does not contribute, along with cigarette smoking, to his obstructive impairment. Decision and Order at 21; *see* 20 C.F.R. §718.201(a)(2); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012). As it is supported by substantial evidence, we affirm the administrative law judge's permissible finding that Dr. Zaldivar's opinion does not establish the absence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); *see Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000).

Similarly, the administrative law judge accorded diminished weight to Dr. Fino's opinion that legal pneumoconiosis is not present. While the physician indicated that the pattern of claimant's impairment was consistent with smoking but rarely found with coal dust exposure,[10] the administrative law judge rationally found that Dr. Fino's opinion is contrary to the regulations and does not consider the additive effects of coal dust and smoking. Decision and Order at 21, 22, 24. As with Dr. Zaldivar's opinion, the administrative law judge permissibly found that Dr. Fino's opinion is not well reasoned because the physician acknowledged claimant's seventeen years of coal mine employment, but failed to adequately explain why it had no impact, along with smoking, on claimant's pulmonary impairment. Decision and Order at 22; *see Owens*, 724 F.3d at 558, 25 BLR at 2-353; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

As the trier-of-fact, the administrative law judge is charged with assessing the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and assigning those opinions appropriate weight. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 321, 25 BLR 2-255, 2-262 (4th Cir. 2013); *Looney*, 678 F.3d at 315-16, 25 BLR at 2-130. 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); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Zaldivar and Fino, the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm her finding

[10] Dr. Fino stated that only a small percentage of miners experience a significant drop in FEV1 values and will generally develop a severe obstructive impairment early in their careers. Further, Dr. Fino observed that only a minority of miners show a reduction in the FEV1/FVC ratio, and that coal dust causes only mild reductions in diffusing capacity, whereas claimant's FEV1/FVC ratio and diffusing capacity were significantly reduced. Employer's Exhibit 6.

that employer failed to disprove the presumed fact of legal pneumoconiosis.[11] *See* 20 C.F.R. §718.305(d)(1)(i).

With regard to the presumed fact of disability causation, the administrative law judge permissibly found that the same reasons she provided for discrediting the opinions of Drs. Zaldivar and Fino that claimant does not suffer from legal pneumoconiosis also undercut their opinions that claimant's disabling respiratory or pulmonary impairment was not caused by pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, BLR (4th Cir. 2015); Decision and Order at 24. Thus, we affirm the administrative law judge's determination that employer failed to rebut the Section

[11] Because employer bears the burden to prove that claimant does not have pneumoconiosis, we need not address employer's arguments regarding the weight the administrative law judge accorded to the opinions of Drs. Forehand, Wolfe and Klayton, that claimant suffers from legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); Employer's Brief at 11-14.

411(c)(4) presumption by establishing that no part of claimant's total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption. Therefore, we affirm the administrative law judge's award of benefits. 30 U.S.C. §921(c)(4).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge