

U.S. Department of Labor

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



BRB No. 19-0083 BLA

JESSE WARD)	
)	
Claimant-Respondent)	
)	
v.)	
)	
WOLF RUN MINING COMPANY)	DATE ISSUED: 04/15/2020
)	
and)	
)	
ARCH COAL INCORPORATED)	
)	
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.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Before: ROLFE, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-05796) of Administrative Law Judge Natalie A. Appetta 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 miner's claim filed on January 6, 2016.

Applying Section 411(c)(4) of the Act,¹ 30 U.S.C. §921(c)(4) (2012), the administrative law judge found claimant established twenty-seven years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. The administrative law judge therefore found claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). She further found employer did not rebut the presumption and awarded benefits.

On appeal, employer challenges the administrative law judge's determination that it did not rebut the Section 411(c)(4) presumption by disproving the existence of both legal and clinical pneumoconiosis or disability causation. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.²

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law.³ 33 U.S.C.

¹ Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

² We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-seven years of qualifying coal mine employment, total disability, and invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6, 17.

³ Because claimant's coal mine employment occurred in West Virginia, 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 (1989) (en banc); Hearing Transcript at 32.

§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).

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

Because claimant invoked the presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut by establishing the miner had neither legal nor clinical pneumoconiosis,⁴ 20 C.F.R. §718.305(d)(2)(i), or by establishing that “no part of the miner’s disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201.” 20 C.F.R. §718.305(d)(2)(ii). The administrative law judge found employer failed to rebut under either method. Decision and Order at 20-23, 25.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, employer must establish claimant does not have 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); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered the opinions of Drs. Celko, Sood, Krefft, Zaldivar and Spagnolo.⁵ Decision and Order at 20-23.

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).

⁵ The administrative law judge also reviewed claimant’s treatment records from Meyers Clinic dated between January 31, 2011 and September 15, 2016, and from Susan A. Ketchum, PA-C, dated January 3, 2018 and March 27, 2018. Decision and Order at 23; Claimant’s Exhibit 7; Employer’s Exhibit 5. The treatment notes from Meyers Clinic that Susan A. Ketchum prepared reflect diagnoses of claimant’s “Active Problems” as atopic dermatitis, chronic obstructive pulmonary disease, coronary artery disease, and Type 2 diabetes. Employer’s Exhibit 5. They also reflect diagnoses of asthma in sections labeled “Past Medical/Surgical History.” *Id.* The note from Susan A. Ketchum dated March 27, 2018, describes a “Social History, Behavioral” of “exposure to second hand smoke since birth.” Claimant’s Exhibit 7.

Dr. Celko examined claimant at the Department of Labor's (DOL) request on April 5, 2016, and diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) caused by coal dust exposure and cigarette smoking. Director's Exhibit 14. Drs. Sood and Krefft reviewed medical records claimant's lay representative provided and diagnosed legal pneumoconiosis in the form of COPD and emphysema related to coal dust exposure and cigarette smoking. Claimant's Exhibits 3-6.

Dr. Zaldivar examined claimant on employer's behalf on April 12, 2017, and reviewed medical records employer's counsel provided. Employer's Exhibits 1; 9 at 9. He diagnosed asthma with COPD, determining claimant had a genetic predisposition to asthma and was exposed to secondhand cigarette smoke and wood smoke in his childhood, which can induce asthma and COPD. Employer's Exhibits 1 at 6; 9 at 12-22. Dr. Zaldivar stated claimant's asthma is completely unrelated to claimant's coal mine employment. *Id.* Dr. Spagnolo reviewed medical records employer's counsel submitted to him and opined that claimant's medical history supports a diagnosis of poorly-treated asthma that, in addition to smoking, caused "some lung remodeling" and an obstructive impairment. Employer's Exhibits 6 at 7; 8 at 8-21. He opined the results of claimant's objective testing are not consistent with a coal dust-induced condition. *Id.*

The administrative law judge credited the diagnoses of legal pneumoconiosis by Drs. Celko, Krefft, and Sood as well-documented and well-reasoned. Decision and Order at 21. She then found Dr. Krefft's view that the record did not support a diagnosis of asthma "more persuasive" than Dr. Zaldivar's contrary view. *Id.* at 22. Regarding Dr. Spagnolo's opinion, she determined he did not adequately explain why coal dust exposure could not have played a causal role in claimant's alleged asthma. *Id.* She also referred to the Drs. Krefft's and Sood's opinions in finding Dr. Spagnolo erroneously relied on claimant's positive response to bronchodilators to exclude a contribution from claimant's coal dust exposure. *Id.* Based on these credibility determinations, the administrative law judge found the opinions of Drs. Zaldivar and Spagnolo did not satisfy employer's burden to disprove legal pneumoconiosis. *Id.* at 22-23.

Employer alleges the administrative law judge erred in finding the diagnoses of legal pneumoconiosis Drs. Celko, Krefft, and Sood made adequately reasoned and documented. Employer's Brief at 15-18. Employer further contends the administrative law judge erred in relying on Drs. Krefft's and Sood's opinions to discredit Drs. Zaldivar's and Spagnolo's opinions. *Id.* at 18-21. These contentions do not have merit.

Because employer bears the burden of proof on rebuttal, the administrative law judge was required to determine whether the opinions of its physicians are credible, irrespective of the weight she assigned to the other medical opinions of record. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939 (4th Cir. 1980); *see also Morrison v. Tenn.*

Consol. Coal Co., 644 F.3d 473, 479-80 (6th Cir. 2011) (record must contain an affirmative showing that the miner does not suffer from pneumoconiosis, or that the disease is not related to coal mine work, for the medical opinion evidence to rebut the §921(c)(4) presumption). Although she expressed her findings in terms of a relative weighing of the medical opinions, the administrative law judge provided valid reasons for discrediting Drs. Zaldivar's and Spagnolo's opinions independent of her weighing of Drs. Celko's, Krefft's, and Sood's opinions.

Regarding Dr. Zaldivar's opinion, the administrative law judge's finding that his diagnosis of lifelong asthma unrelated to claimant's coal dust exposure is not well-documented is rational and supported by substantial evidence. As the administrative law judge observed in her summaries of the medical evidence, claimant's medical records show: onset of his respiratory symptoms late in his coal mining career; no history of hospitalizations for asthma-related events; and a persistent, worsening obstructive impairment consistent with COPD and emphysema, which can be related to coal dust exposure. *See* Decision and Order at 12-17, 22. Thus, we affirm the administrative law judge's determination that Dr. Zaldivar's opinion did not disprove legal pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-34 (4th Cir. 1998); Decision and Order at 22. The administrative law judge also permissibly discredited Dr. Spagnolo's diagnosis of asthma unrelated to coal dust exposure because he "did not address whether coal dust exposure might aggravate any asthma." Decision and Order at 22; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995). We therefore affirm her finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have legal pneumoconiosis.⁶ 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 23.

Disability Causation

The administrative law judge next addressed whether employer established that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 24-25. Employer alleges the errors the administrative law judge committed in weighing the evidence relevant to legal

⁶ Because employer must rebut both legal and clinical pneumoconiosis, the administrative law judge's finding that employer did not disprove legal pneumoconiosis precluded rebuttal under 20 C.F.R. §718.305(d)(1)(i). Accordingly, we need not address employer's allegations that the administrative law judge erred in determining it failed to disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 9-13.

pneumoconiosis caused her to err in finding employer did not rebut disability causation. Employer's Brief at 9, 14-22. We disagree.

The administrative law judge rationally discounted the opinions of Drs. Zaldivar and Spagnolo on the cause of claimant's respiratory disability because neither physician diagnosed legal pneumoconiosis, contrary to her finding that employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 25. We therefore affirm the administrative law judge's finding that employer failed to establish that no part of claimant's total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 25.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge