

U.S. Department of Labor

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



BRB No. 20-0020 BLA

DAN MARUNICH)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	
)	DATE ISSUED: 11/18/2020
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Granting the Claimant's Request for Modification and Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, for Claimant.

Kathy L. Snyder and Andrea L. Berg (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge Drew A. Swank's Decision and Order Granting the Claimant's Request for Modification and Awarding Benefits (2017-BLA-

05614) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (the Act). This case involves Claimant's request for modification of a subsequent claim filed on July 10, 2012.¹

In the initial decision, the administrative law judge found the new evidence established the existence of legal pneumoconiosis and therefore found Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §§718.202(a)(4), 725.309. Considering the merits of Claimant's 2012 claim, the administrative law judge found the evidence did not establish a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b). He therefore found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,² 30 U.S.C. §921(c)(4) (2018), or establish entitlement to benefits under 20 C.F.R. Part 718. Accordingly, he denied benefits.

Claimant timely moved for modification. In a Decision and Order dated September 17, 2019, the administrative law judge credited Claimant with twenty-eight years of underground coal mine employment³ and found the new evidence established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). He therefore found Claimant established a change in conditions pursuant to 20 C.F.R. §725.310,⁴ and invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. He further found Employer did not rebut the presumption and awarded benefits.

¹ Claimant filed a previous claim on May 15, 2003. Director's Exhibit 1. The district director denied the claim on April 16, 2004 because Claimant did not establish any element of entitlement. *Id.*

² Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

³ Claimant's coal mine employment occurred in Pennsylvania. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

⁴ The administrative law judge also found that granting modification would render justice under the Act.

On appeal, the Employer argues that the administrative law judge erred in finding it did not rebut the presumption.⁵ Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Benefit Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order 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, 362 (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 Claimant has neither legal nor clinical pneumoconiosis,⁶ or that "no part of [his] 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 Employer failed to establish rebuttal by either method.

To disprove legal pneumoconiosis,⁷ 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 Co.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting).

⁵ We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We similarly affirm the administrative law judge's findings pursuant to 20 C.F.R. §§725.309, 725.310. *Id.*

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). "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).

⁷ The administrative law judge found Employer established Claimant does not have clinical pneumoconiosis. Decision and Order at 23.

The administrative law judge considered the medical opinions of Drs. Castle and Basheda, both of whom opined Claimant does not have legal pneumoconiosis.⁸ Dr. Castle diagnosed obstructive pulmonary disease due to asthma and cigarette smoking. Employer's Exhibits 5, 12 at 27-28. Dr. Basheda diagnosed tobacco-induced chronic obstructive pulmonary disease, with an asthmatic component. Employer's Exhibits 9, 11 at 31. The administrative law judge discounted their opinions because he found the doctors failed to adequately explain how they eliminated Claimant's twenty-eight years of coal mine dust exposure as a contributor to his disabling obstructive pulmonary impairment. Decision and Order at 24-25.

Employer argues the administrative law judge erred in discrediting the opinions of Drs. Castle and Basheda. Employer's Brief at 5-16. We disagree. The administrative law judge accurately noted Drs. Castle and Basheda excluded coal mine dust exposure as a cause of Claimant's obstructive pulmonary impairment based in part on the partial reversibility of Claimant's impairment after the administration of a bronchodilator during a pulmonary function study. Decision and Order at 24. The administrative law judge permissibly found Drs. Castle and Basheda failed to adequately explain why the irreversible portion of Claimant's pulmonary impairment, which remained totally disabling after bronchodilation, was not due in part to coal mine dust exposure, or why Claimant's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of Claimant's obstructive pulmonary impairment.⁹ See *Banks*, 690 F.3d at 489; *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 24.

The administrative law judge also permissibly rejected the opinions of Drs. Castle and Basheda because the doctors did not adequately explain why Claimant's coal mine

⁸ The administrative law judge also considered the opinions of Drs. Sood and Cohen. Dr. Sood diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease due to cigarette smoking and coal mine dust exposure. Director's Exhibits 68, 87. Dr. Cohen opined that Claimant's coal mine dust exposure was a significant contributory cause of his moderate to severe obstructive lung disease. Director's Exhibit 60; Claimant's Exhibits 4, 4a.

⁹ The administrative law judge accurately noted Claimant's two most recent pulmonary function studies conducted on April 23, 2018 and December 28, 2018 produced qualifying results even after the administration of a bronchodilator. Decision and Order at 24; Claimant's Exhibit 1; Employer's Exhibit 9. A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

dust exposure was not an additive factor, along with smoking and asthma, in causing his obstructive pulmonary impairment.¹⁰ See 20 C.F.R. §718.201(b); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); Decision and Order at 24-25.

Because the administrative law judge permissibly discredited the opinions of Drs. Castle and Basheda,¹¹ the only opinions supportive of a finding that Claimant does not have legal pneumoconiosis, we affirm his determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing Claimant does not have pneumoconiosis. See 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether Employer established “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). He rationally discounted Drs. Castle’s and Basheda’s disability causation opinions because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the existence of the disease. 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 (6th Cir. 2013); Decision and Order at 26. Therefore, we affirm the administrative law judge’s determination that Employer failed to rebut legal pneumoconiosis as a cause of Claimant’s total disability. See 20 C.F.R. §718.305(d)(1)(ii).

¹⁰ The administrative law judge found Drs. Castle and Basheda failed to explain why Claimant’s significant coal mine dust exposure was not a contributing or aggravating factor in his obstructive pulmonary impairment. Decision and Order at 24-25.

¹¹ Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Castle and Basheda, any error in discrediting their opinions for other reasons would be harmless. See *Kozele v. Rochester & 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 their opinions.

Accordingly, the administrative law judge's Decision and Order Granting the Claimant's Request for Modification and Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge