

U.S. Department of Labor

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



BRB No. 19-0540 BLA

JOHN EVANCHESKY)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CONSOL PENNSYLVANIA COAL)	
COMPANY)	
)	
and)	
)	DATE ISSUED: 09/28/2020
CONSOL ENERGY, 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.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Deanna Lyn Istik (Sutter Williams, LLC), Pittsburgh, Pennsylvania, for Employer/Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Natalie A. Appetta's Decision and Order Awarding Benefits (2018-BLA-05510) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on January 25, 2017.¹

The administrative law judge credited Claimant with thirty-two years of underground coal mine employment based on the parties' stipulation and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant established a change in an applicable condition of entitlement and invoked 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); 20 C.F.R. §725.309(c). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer contends the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response.

The Benefits 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.³ 33 U.S.C. §921(b)(3), as incorporated

¹ Claimant filed an initial claim on March 3, 2010. Director's Exhibit 1. Administrative Law Judge Drew A. Swank denied it on March 1, 2013 because Claimant failed to 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 This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant's coal mine employment occurred in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 30.

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,⁴ the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,⁵ or “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.

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.”⁶ 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, 159 (2015) (Boggs, J., concurring and dissenting). The administrative law judge weighed the opinions of Drs. Basheda and Rosenberg that Claimant does not have legal pneumoconiosis. Employer’s Exhibits 1-3.

Dr. Basheda

⁴ We affirm, as unchallenged on appeal, the administrative law judge’s finding that Claimant invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Employer’s Brief at 4.

⁵ “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). The definition includes “any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §718.201(b). “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).

⁶ The administrative law judge found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 26.

Dr. Basheda diagnosed chronic obstructive pulmonary disease (COPD). Employer's Exhibit 3 at 30. Because Claimant's pulmonary function testing evidenced an acute bronchodilator response, he opined the COPD was due to "persistent asthma" that was not adequately treated and caused "permanent anatomic changes of the airways." *Id.* at 31. He excluded legal pneumoconiosis because he opined "[p]ersistent asthma is not caused by [coal mine dust exposure]." *Id.* at 33. He stated if Claimant's asthma had been aggravated by coal mine dust exposure, Claimant could not have worked in coal mine employment for thirty years "without having serious health concerns." *Id.* at 39.

In weighing Dr. Basheda's opinion, the administrative law judge found the "more recent pulmonary function study results, including the [results Dr. Basheda] obtained on March 6, 2018, . . . did not show an acute bronchodilator response." Decision and Order at 24-25. She found Dr. Basheda's opinion inadequately reasoned because he did not address the more recent objective testing that did not demonstrate an acute bronchodilator response. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97 (3d Cir. 2002); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211 (3d Cir. 2002); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 24-25.

Dr. Rosenberg

Dr. Rosenberg opined Claimant's pulmonary function testing taken before 2005 reflected a mild obstructive respiratory impairment that reversed with bronchodilator administration. Employer's Exhibit 4. He explained this reversible obstructive impairment was consistent with asthma that is unrelated to coal mine dust exposure. *Id.* He noted Claimant developed right hemidiaphragm dysfunction around 2005 and opined this condition caused further deterioration in lung function that resulted in Claimant being totally disabled by a combined obstructive and restrictive impairment. *Id.* He concluded Claimant's disabling respiratory condition is due to asthma, diaphragm paralysis, and obesity, and is unrelated to coal mine dust exposure. *Id.*

The administrative law judge found Dr. Rosenberg's opinion is "conclusory" because he "did not include any discussion" to support his opinion that Claimant's asthma is unrelated to coal mine dust exposure. Decision and Order at 25-26; *see Balsavage*, 295 F.3d at 396-97; *Kramer*, 305 F.3d at 211; *Owens*, 724 F.3d at 558; 20 C.F.R. §§718.201(b), 718.305(d)(1)(i)(A).

In challenging the administrative law judge's findings on the issue of legal pneumoconiosis, Employer summarizes the opinions of Drs. Basheda and Rosenberg and argues their opinions are "the most well-reasoned and well-documented" on the issue of legal pneumoconiosis. Employer's Brief at 5-7. It argues these doctors relied on Claimant's objective testing and medical history when rendering their opinions. *Id.* at 5-

7, 9. However, it does not identify any specific error with respect to the administrative law judge's discrediting of the physicians' opinions.

We consider Employer's arguments on appeal to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Employer's Brief at 5-13. Consequently, we affirm her finding Employer did not disprove legal pneumoconiosis and her determination it did not rebut the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis.⁷ *See* 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

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). She permissibly discredited the disability causation opinions of Drs. Basheda and Rosenberg because neither diagnosed legal pneumoconiosis, contrary to her finding Employer failed to disprove Claimant has the disease.⁸ *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 26. We therefore affirm the administrative law judge's finding Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii), and the award of benefits.

⁷ Because we affirm the administrative law judge's discrediting the opinions of Drs. Basheda and Rosenberg, the only opinions supportive of Employer's burden of proof, we need not address Employer's arguments regarding Dr. Zlupko's opinion that Claimant has legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 5-15.

⁸ Neither physician offered an opinion as to disability causation that did not depend upon his prior exclusion of the existence of legal pneumoconiosis.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge