U.S. Department of Labor

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

BRB No. 19-0203 BLA

ONNIE D. BACK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BOWIE REFINED COAL LLC	)	
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	DATE ISSUED: 04/28/2020
	)	
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 Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for claimant.

H. Brett Stonecipher (Reminger Co., L.P.A.), Lexington, Kentucky, for employer/carrier.

Edward Waldman (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05874) of Administrative Law Judge Timothy J. McGrath, rendered 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 filed on November 17, 2014.

After accepting the parties' stipulation to forty-three years of coal mine employment,[1] the administrative law judge found that at least fifteen of those years occurred either underground or in conditions substantially similar to those in an underground mine. He also found claimant has a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), and therefore 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) (2012). The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer contends the administrative law judge erred in finding it is the responsible operator. Alternatively, employer argues the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging affirmance of the administrative law judge's determination employer is the responsible operator.

[1] The record reflects that claimant's last coal mine employment occurred in Kentucky. Director's Exhibit 56 at 26. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. We affirm, as unchallenged, the administrative law judge's finding that claimant invoked the presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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. 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).

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner" for at least one year. 20 C.F.R. §§725.494(c), 725.495(a)(1).[3] The administrative law judge found employer was the potentially liable operator that most recently employed the miner for a cumulative year and thus is liable for benefits. Decision and Order at 9. Employer, Bowie Refined Coal (Bowie), contends that it is not the responsible operator because it did not employ claimant as a "miner."[4] We disagree.

Claimant's last coal mine employment took place at a coal preparation plant operated by a series of companies, the last two of which were Covol Fuels (Covol) and Bowie. Hearing Transcript at 39. During Covol's operation of the plant, the company produced coal by recovering and processing it from a slurry pond. *Id.* at 33-34. Bowie purchased the facility from Covol in January 2013. Director's Exhibit 56 at 8. At the time Bowie purchased the facility, it was idle. *Id.* at 11. Covol had exhausted its waste storage capacity, without which the facility could not operate. Director's Exhibit 56 at 12, 27-28.

To create new waste storage space, Bowie hired a contractor to install an injection system to allow the waste to be pumped into an abandoned underground coal mine located below the coal preparation facility. Director's Exhibit 56 at 13, 18. Bowie continued to employ claimant, who worked as a foreman for thirteen months. Hearing Transcript at 17. Claimant's work included replacing pipelines, doing maintenance on the plant, performing upkeep on the dredge, putting in a new submersible pump, and moving a booster plant. *Id.* Ultimately, Bowie terminated the underground injection system project without

[3] In addition, the evidence must establish that the miner's disability or death arose out of employment with that operator; the entity was an operator after June 30, 1973; the miner's employment included at least one working day after December 31, 1969; and the operator is financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

[4] Employer does not challenge the administrative law judge's finding that it employed claimant for thirteen months. Decision and Order at 9. We therefore affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

reactivating the coal preparation plant. Director's Exhibit 56 at 13-14, 29.

The administrative law judge found that claimant was engaged in construction work, making additions and improvements to Bowie's plant while it was undergoing renovation construction for reopening. *Id.* We affirm the administrative law judge's finding that Bowie employed claimant as a construction worker as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The regulations include special provisions for coal mine construction workers. Construction workers are considered to be "miners" under the Act if they are exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b). Such workers are entitled to a rebuttable presumption that they were exposed to coal mine dust during all periods of such employment for determining the identity of a coal mine operator liable for the payment of benefits. 20 C.F.R. §725.202(b)(1)(iii). The presumption may be rebutted by evidence demonstrating the worker either was not regularly exposed to coal mine dust or did not work regularly in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b)(2)(i), (ii).

Bowie did not dispute that claimant's employment satisfies the "situs prong"; his work occurred in or around a coal preparation facility. Decision and Order at 8. In its post-hearing brief, Bowie conceded "there is no dispute that [claimant's] employment occurred at a coal preparation facility, satisfying the situs prong." Employer's Post-Hearing Brief at 16 (unpaginated).[5] Accordingly, Bowie has waived the argument that claimant did not work regularly in or around a coal preparation facility and we decline to address it. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003).

Bowie argues that claimant was not a miner because its facility was not a coal mine. Employer's Brief at 14-15. Even if this argument were properly before the Board, it has no merit. A coal mine is defined as:

> an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, *or to be used in*, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth

[5] Employer made a similar concession in its controversion of the district director's Proposed Decision and Order. Director's Exhibit 74 at 2.

> by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

20 C.F.R. § 725.101(a)(12) (emphasis added). Thus where, as here, the area of land and the structures, facilities, etc., were "to be used in" the extraction or preparation of coal, they constitute a coal mine.[6] *Id.*

Furthermore, contrary to employer's contention, the fact that claimant worked as a construction worker at a non-operational mine site does not, by itself, demonstrate a lack of qualifying coal mine dust exposure. Employer's Brief at 14-18. In promulgating the regulation at 20 C.F.R. §725.202, the Department of Labor determined that a "construction worker who builds the 'coal mine' is a 'miner' to the extent work at the covered site exposes him or her to 'coal mine dust.'" 65 Fed. Reg, 79,920, 79961 (Dec. 20, 2002). As the Department noted, "the construction process itself may expose the miner to coal mine dust." *Id.*

Thus, the administrative law judge properly considered whether employer rebutted the presumption by establishing that claimant was not regularly exposed to coal mine dust during his construction work in or around Bowie's coal preparation facility. The administrative law judge considered testimony from claimant and Justin Thompson, Bowie's Chief Executive Officer.[7]

Mr. Thompson[8] testified that claimant's job duties[9] at Bowie would have involved

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[6] The administrative law judge noted that Justin Thompson, Bowie's Chief Executive Officer, testified that Bowie acquired the Covol operation with the intent to get the coal preparation plant back into production. Decision and Order at 8; Director's Exhibit 56 at 10-11.

[7] The administrative law judge also considered a statement from Mr. Roy West, a controller with Bowie. Director's Exhibit 6. The administrative law judge found that Mr. West provided no indication he was familiar with claimant's specific job duties for Bowie. Decision and Order at 9. The administrative law judge therefore credited claimant's testimony over Dr. West's statements. *Id.* We affirm this finding as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[8] At the time of claimant's employment, Mr. Thompson was Bowie's Vice President of Operations. Director's Exhibit 56 at 9.

[9] Mr. Thompson testified that claimant's job title was plant technician, which he noted is not the same as a foreman. Director's Exhibit 56 at 21. However, if claimant was

only minor tasks, such as maintaining a certain water quality in the pond, operating and repairing the pumps, maintaining proper pool elevation, and making sure the chemical system worked. Director's Exhibit 56 at 16-17. Because the slurry on the site was "at least forty percent moisture," Mr. Thompson testified that he did not think claimant was exposed to dust. *Id.* at 17. He further stated that claimant "was not exposed to coal dust under his employment with Bowie because [Bowie] never processed any coal." *Id.* at 30. Mr. Thompson also testified that contractors performed a majority of the injection system construction, including the drilling. *Id.* at 19.

Conversely, claimant testified that he was exposed to coal mine dust while working for Bowie. Hearing Transcript at 41. He explained that coal was ground up in the road, creating black dust that would penetrate even the closed cabs on the loaders.[10] *Id.* at 23-24. When digging to install the new pipes, there was coal dust and old slurry three inches from the surface. *Id.* at 43. At the end of his shift, his face, hands, and arms were black. *Id.* at 24. Even after showering, he had to change his bed sheets twice a week because they became covered with coal dust. *Id.* at 24-25.

The administrative law judge noted that claimant testified three times,[11] providing a consistent description of his duties at Bowie. Decision and Order at 9. He found claimant "exceptionally articulate, and wholly credible." *Id.* He therefore credited his testimony about his job duties and exposure to coal mine dust during the time he was employed by Bowie. *Id.* He specifically credited claimant's testimony over that of Mr. Thompson, who the administrative law judge found was "clearly not familiar with [c]laimant's day-to-day duties, and . . . was not at the plant on a daily basis." *Id.* Based on claimant's wholly credible testimony, the administrative law judge found he was regularly exposed to coal mine dust for the thirteen months he worked for Bowie in or around a coal mine or coal preparation facility – and thus employer did not satisfy its burden to prove otherwise. *Id.*

The administrative law judge, as fact-finder, evaluates the credibility of witness testimony. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). He permissibly credited claimant's testimony that

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a foreman, Mr. Thompson testified that this would have reduced any potential for exposure to coal dust, because he would be performing only a supervisory role. *Id.* at 29-30.

[10] Claimant testified that a lot of the road material was "coal product." Hearing Transcript at 47.

[11] Claimant testified during depositions on March 19, 2015, and October 5, 2015, Director's Exhibits 23, 25, and at the April 19, 2017 hearing.

he was regularly exposed to coal mine dust for the thirteen months he worked in construction for Bowie. *See Rowe*, 710 F.2d at 255. Because it is supported by substantial evidence, we affirm the administrative law judge's finding. We therefore affirm the administrative law judge's determination that claimant was a "miner" under the Act during this time and, thus, Bowie was properly designated as the responsible operator as the last operator to employ claimant for one year.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish claimant has neither legal nor clinical pneumoconiosis[12] 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).

To establish the miner did not have legal pneumoconiosis,[13] employer must demonstrate he 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 United States Court of Appeals for the Sixth Circuit holds that an employer may rebut legal pneumoconiosis by showing that the miner's coal mine employment "did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). The "in part" standard requires employer to show that coal mine dust exposure "had at most only a *de minimis* effect on [the miner's] lung impairment." *Id.* at 407.

Employer argues the administrative law judge erred in requiring employer to establish coal mine dust exposure played "no part" in causing claimant's respiratory

[12] "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).

[13] The administrative law judge found employer established claimant did not have clinical pneumoconiosis. Decision and Order at 35.

impairment. Employer's Brief at 35. We disagree. The administrative law judge correctly stated that legal pneumoconiosis includes any chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 35-36; 20 C.F.R. §§718.201(a)(2),(b). Moreover, he properly considered whether claimant's respiratory impairment was related to coal mine dust exposure. *Young,* 947 F.3d at 405-407; Decision and Order at 42.

Additionally, as discussed, *infra*, the administrative law judge did not reject the opinions of Drs. Rosenberg and Broudy as insufficient to meet a "rule out" standard. Rather, he found their opinions on legal pneumoconiosis not credible because they were not adequately explained. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) (administrative law judge permissibly rejected physician's opinion failing to adequately explain why coal dust exposure did not exacerbate claimant's smoking-related impairments); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012) (administrative law judge may accord less weight to physician who fails to adequately explain why a miner's obstructive disease "was not due at least in part to his coal dust exposure").

Drs. Rosenberg and Broudy opined claimant does not have legal pneumoconiosis,[14] but has chronic obstructive pulmonary disease (COPD) due to smoking. Employer's Exhibits 7-10. The administrative law judge found their opinions not well-reasoned because they did not credibly explain how they determined claimant's years of coal mine dust exposure did not contribute, along with his smoking, to his pulmonary disease. Decision and Order at 38-42.

We reject employer's contention the administrative law judge erred in so finding. Employer's Brief at 13-21. He accurately noted Drs. Rosenberg and Broudy eliminated a diagnosis of legal pneumoconiosis because claimant has a marked reduction of his FEV1/FVC ratio on his pulmonary function study results which they opined is consistent with smoking, not coal mine dust inhalation. Decision and Order at 38-39, 41; Employer's Exhibits 7 at 6-7; 10 at 37. The administrative law judge permissibly discredited their opinions because their views conflict with the medical science the Department accepts that coal mine dust exposure can cause clinically significant obstructive disease that can be shown by a reduction in the FEV1/FVC ratio. 65 Fed. Reg. at 79,943; *see Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014).

[14] The administrative law judge also considered the opinions of Drs. Chavda, Baker, McGhee, and Sood diagnosing chronic obstructive pulmonary disease (COPD) due to both coal mine dust exposure and smoking. Decision and Order at 36-37; Director's Exhibit 19; Claimant's Exhibits 1, 5, 6.

The administrative law judge also noted Drs. Rosenberg and Broudy relied on statistics demonstrating the probability claimant's COPD was due to coal mine dust exposure was low, while the magnitude of his risk for COPD due to smoking was much higher.[15] The administrative law judge, however, found this reasoning did "not explain why, in [c]laimant's particular circumstances, his coal mine dust exposure could not be a factor in his airway obstruction." Decision and Order at 43. The administrative law judge therefore permissibly discredited their opinions as based on generalities, rather than on claimant's specific condition. *See Rowe*, 710 F. 2d at 255; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985) (physician's opinion based on generalities rather than specifics may be discredited).

The administrative law judge also permissibly discredited the opinions of Drs. Rosenberg and Broudy because, even assuming the primary cause of claimant's COPD was smoking, they failed to adequately explain how they eliminated claimant's years of coal mine dust exposure as a significant contributor along with his smoking to his obstructive pulmonary impairment.[16] *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d at 313-14; Decision and Order at 40, 42.

Because the administrative law judge permissibly discredited the opinions of Drs. Broudy and Rosenberg,[17] the only opinions supportive of a finding that claimant does not have legal pneumoconiosis, we affirm his determination that employer failed to rebut the

[15] Dr. Rosenberg relied upon "literature showing that the effects of cigarette smoking are significantly more pronounced than coal dust." Employer's Exhibit 7 at 9. Dr. Broudy relied upon studies showing that nonsmoking miners rarely develop disabling impairment and smoking is far more injurious than coal mine dust exposure. Employer's Exhibit 10 at 26, 29-30.

[16] The administrative law judge found Dr. Rosenberg "failed to adequately consider any additive effects of coal mine dust exposure, or explain why, even if the primary cause of [c]laimant's emphysema/COPD was his cigarette smoking, his significant history of coal mine dust exposure did not play a role." Decision and Order at 40. The administrative law judge found Dr. Broudy "did not adequately explain why, even if cigarette smoking was the primary cause of [c]laimant's respiratory impairment, the exposure to coal mine dust did not play a role." *Id.* at 42.

[17] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Rosenberg and Broudy, we need not address employer's remaining arguments regarding the weight accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether employer established that "no part of [claimant'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. Rosenberg's and Broudy'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 Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 44. 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).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge