U.S. Department of Labor

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

BRB No. 19-0230 BLA

SADIE JUDE (o/b/o CLISTON JUDE)	)	
Claimant-Respondent	)	
v.	)	
SHELL COAL & TERMINAL COMPANY d/b/a WOLF CREEK COLLIERIES, INCORPORATED	)	
and	)	DATE ISSUED: 04/30/2020
SAINT PAUL FIRE & MARINE INSURANCE COMPANY	)	
Employer/Carrier-Respondents	)	
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 Larry A. Temin, Administrative Appeals Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer/carrier.

Cynthia Liao (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 (2017-BLA-06135) of Administrative Law Judge Larry A. Temin on a subsequent claim[1] filed on June 27, 2016,[2] pursuant to the Black Lungs Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge found the miner had 15.02 years of surface coal mine employment[3] in conditions substantially similar to those in an underground mine and was totally disabled. He thus found claimant established a change in an applicable condition of entitlement and invoked the presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §§718.204(b)(2), 725.309.[5] The administrative law judge further found employer did not rebut the presumption and awarded benefits.

[1] The miner died on August 10, 2016, while his subsequent claim was pending. Decision and Order at 3. Claimant, the miner's widow, is pursuing the claim on his behalf.

[2] The miner previously filed seven claims. Director's Exhibits 1-7. He filed his most recent claim on February 13, 2012, which the district director denied because he did not establish total disability. Decision and Order at 2; Director's Exhibit 6.

[3] The miner's last coal mine employment occurred in Kentucky. Director's Exhibit 10. 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).

[4] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption the miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground coal mine employment or substantially similar surface coal mine employment, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[5] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of

On appeal, employer summarily contends that Section 1556 of the Patient Protection and Affordable Care Act, which revived the Section 411(c)(4) presumption, "violates Article II of the United States Constitution." Employer's Brief at 3; *see* Pub. L. No. 111-148, §1556 (2010). On the merits of entitlement, employer argues the administrative law judge erred in finding 15.02 years of qualifying coal mine employment, total disability, and invocation of the Section 411(c)(4) presumption. It also argues he erred in finding it did not rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), in a limited response, urges the Board to decline to entertain employer's unidentified constitutional objections and reject its argument that the administrative law judge erred in finding the miner's surface coal mine employment qualifying to invoke the presumption.

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, 362 (1965).

As a threshold matter, we agree with the Director that employer failed to provide any specific argument for its constitutional objection to Section 411(c)(4); it merely states a one sentence, unsupported conclusion that revival of the presumption violates Article II. Employer's Brief at 3. Thus, we decline to address it. 20 C.F.R. §802.211(b); *see Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Section 411(c)(4) Presumption - Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, claimant must establish the miner had at least fifteen years of employment in underground coal mines or surface coal mines in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4) (2012); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). The conditions in a surface mine are "substantially similar" to those underground if "the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

The totality of employer's first assertion is "[t]he [administrative law judge] analyzed the total number of years that [the miner] was employed in coal mining even though the parties stipulated to 14 years of surface coal mine employment at the hearing."

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entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the miner's prior claim was denied for failure to establish total disability, claimant was required to establish this element in order for the subsequent claim to be considered on the merits. Director's Exhibit 6.

Employer's Brief at 4. To the extent employer is alleging the administrative law judge was without authority to determine the length of the miner's coal mine employment, we disagree.

An administrative law judge exercises broad discretion in resolving procedural and evidentiary matters. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc). Thus, a party seeking to overturn an administrative law judge's disposition of a procedural or evidentiary issue must establish that the administrative law judge's action represented an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). Although the parties may stipulate to facts before an administrative law judge, the stipulations are not binding if the administrative law judge disapproves them. 29 C.F.R. §18.83(a).

At the hearing, in response to the administrative law judge's questions, claimant and employer stated they could agree to "14 years [of surface coal mine employment] as found by the district director." Hearing Transcript at 14-15. In their post-hearing briefs, however, both parties described a disagreement about the length of coal mine employment and neither party characterized their discussion with the administrative law judge as a joint stipulation to *only* 14 years. Employer stated "[t]he miner claims to have worked 30 years in coal mining, but the District Director found evidence of only 14 years for such employment." Employer's Post-Hearing Brief at 2, 5. Because "[c]laimant has worked 14 years in surface coal mining," employer argued "the 15-year presumption is not applicable." *Id*. Claimant's post-hearing brief included an "Issues" chart stating "[t]he miner worked at least 30 years in or around one or more coal mines. DOL Proven = 14 years." Claimant's Post-Hearing Brief at 11, 16. As to whether employer contested the issue, claimant noted "STIP." *Id*. Claimant also requested the administrative law judge determine whether the Section 411(c)(4) presumption applies in this case. *Id*. at 17.

Based on the parties' characterization of the dispute over the length of the miner's coal mine employment and whether the Section 411(c)(4) presumption applies, the administrative law judge did not abuse his discretion in considering the issue. *Blake*, 24 BLR at 1-113; *Dempsey*, 23 BLR at 1-63; *Clark*, 12 BLR at 1-152; 29 C.F.R. §18.83(a). He acknowledged "neither party disputed the district director's finding at the hearing," but permissibly determined he should "examine the record" to determine the length of the miner's coal mine employment in light of the discrepancy between the thirty years claimant alleged and the fourteen years the district director found and employer advocated. Decision and Order at 4.

We also reject employer's argument that the regulation at 20 C.F.R. §718.305(b)(2), defining "substantial similarity" of dust conditions between surface and underground mines, is invalid because it is contrary to the Act. Employer's Brief at 4. The United States

Court of Appeals for the Sixth Circuit has rejected similar arguments and upheld the validity of 20 C.F.R. §718.305(b)(2). *See Zurich v. Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 301-03 (6th Cir. 2018) (Kethledge, J., concurring); *see also Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1219-23 (10th Cir. 2018). Because employer does not raise any specific argument challenging the administrative law judge's calculation of 15.02 years of surface coal mine employment or his finding that all of the miner's employment was in dust conditions substantially similar to those underground, we affirm his finding the miner had at least fifteen years of qualifying coal mine employment. *See Cox*, 791 F.2d at 446; *Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109; 20 C.F.R. §§718.305(b)(i), 802.211.

Total Disability

To invoke the Section 411(c)(4) presumption, claimant must also establish the miner was totally disabled at the time of his death. 20 C.F.R. §718.305(b)(iii). A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work.[6] *See* 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions.[7] 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge considered two new arterial blood gas studies conducted on September 30, 2016, and September 14, 2017. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 9. The September 30, 2016 study produced qualifying[8] values at

[6] The administrative law judge noted the miner testified "he would lift 40 to 50 pounds at work when helping with maintenance" and his employment forms indicate he "would lift 50 pounds several times per day." Decision and Order at 17, *citing* Hearing Transcript at 24-25; Director's Exhibit 12. Thus he found the miner's usual coal mine employment "required him to perform some manual labor." *Id.* We affirm this finding as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[7] The administrative law judge found claimant did not establish total disability based on the pulmonary function studies. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 16. The record contains no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii).

[8] A "qualifying" blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C, for establishing total disability. 20 C.F.R. §718.204(b)(2)(ii). A "non-qualifying" study exceeds those values.

rest and with exercise. Director's Exhibit 18. The September 14, 2017 study produced non-qualifying values at rest, but did not include any testing with exercise.[9] Employer's Exhibit 2. Contrary to employer's argument, the administrative law judge was not required to assign the most weight to the September 14, 2017 non-qualifying study because it was taken more recently. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993) (the theory that a "later test or exam" is a "more reliable indicator of a miner's condition than an earlier one" is logical only where "a miner's condition has worsened" given the progressive nature of pneumoconiosis); Employer's Brief at 5. Further, he permissibly assigned more weight to the September 30, 2016 qualifying exercise blood gas study over the studies done at rest because exercise testing is "more probative of a miner's ability to perform manual labor." Decision and Order at 16-17; *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984); *Sturnick v. Consolidation Coal Co.*, 2 BLR 1-972, 1-977 (1980). Thus we affirm his finding that the blood gas studies establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 16-17.

The administrative law judge next weighed the medical opinions of Drs. Forehand and Baker that the miner was totally disabled and the contrary opinion of Dr. Rosenberg. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 17-18.

The administrative law judge permissibly discredited Dr. Rosenberg's opinion because he focused on the non-qualifying resting blood gas tests, but did not adequately address the qualifying exercise blood gas testing the administrative law judge found more probative of the miner's ability to perform manual labor. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 17. The administrative law judge also rejected Dr. Rosenberg's opinion because he incorrectly assumed the miner's usual coal mine employment required no manual labor, contrary to the administrative law judge's finding that it required some manual labor including lifting fifty pounds several times per day. Decision and Order at 17. He further found Dr. Rosenberg "suggested that the changes in the [m]iner's test results were due to the different altitudes and barometric pressure," but cited no "medical or scientific literature to support his assertion" and did "not fully explain how such outside conditions would have impacted the test results." Decision and Order at 17-18. We affirm these credibility findings as unchallenged. *See Napier*, 301 F.3d at 713-714; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); *Crisp*, 866 F.2d at 185; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[9] Dr. Rosenberg indicated an exercise blood gas test was not done because the miner experienced chest pain with exercise. Employer's Exhibit 2.

Drs. Forehand and Baker both diagnosed totally disabling exercise-induced hypoxemia evidenced by arterial blood gas testing. Director's Exhibit 18; Claimant's Exhibits 10, 11. Contrary to employer's argument, the administrative law judge permissibly found their opinions well-reasoned and documented because they relied on "reasoned medical judgment," their conclusions are "based on medically-acceptable clinical and laboratory diagnostic techniques," and their diagnoses are "supported by the test results in the record, including the [qualifying] September 30, 2016 exercise [blood gas] study results." Decision and Order at 17; *see Napier*, 301 F.3d at 713-714; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255. Because it is supported by substantial evidence, we affirm his finding the medical opinions establish total disability. 20 C.F.R. §718.204(b)(2)(iv).

We also affirm his findings that all of the relevant evidence weighed together establishes total disability,[10] claimant established a change in an applicable condition of entitlement, and she invoked the Section 411(c)(4) presumption. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; 20 C.F.R. §§725.309, 718.204(b)(2); Decision and Order at 18.

Rebuttal of Section 411(c)(4)

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish the miner had neither legal nor clinical pneumoconiosis[11] 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.

We affirm the administrative law judge's finding employer failed to disprove the miner had clinical pneumoconiosis as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 24-25. Employer's failure to disprove clinical pneumoconiosis precludes finding the miner did not have pneumoconiosis. 20 C.F.R.

[10] The administrative law judge permissibly found the evidence from the miner's prior claims entitled to "less probative value because of its age." Decision and Order at 18; *see Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc).

[11] "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).

§718.305(d)(1)(i). Nevertheless, because legal pneumoconiosis is relevant to the second method of rebuttal, we will address employer's contention the administrative law judge erred in finding it failed to disprove the existence of legal pneumoconiosis. *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting); Employer's Brief at 7-8.

To disprove legal pneumoconiosis, employer must establish the miner did 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*, 25 BLR at 1-155 n.8. The Sixth Circuit holds this standard requires employer to "disprove the existence of 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). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id*. at 407, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

Employer relies on Dr. Rosenberg, who opined the miner's oxygenation impairment evidenced by blood gas testing was unrelated to the miner's coal mine dust exposure because it was variable over time. He attributed any symptoms the miner experienced to "underlying heart disease." Employer's Exhibits 2, 5. The administrative law judge permissibly found Dr. Rosenberg's opinion "vague, conclusory and not well-reasoned" because the doctor "did not provide any medical literature to support his assertion that coal mine dust only causes a fixed oxygenation impairment." Decision and Order at 24; *see Napier*, 301 F.3d at 713-714; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255. He also permissibly found the treatment records do not support Dr. Rosenberg's opinion because they reflect the miner underwent treatment "for respiratory conditions with no . . . treatment for cardiac conditions."[12] Decision and Order at 24; *see Napier*, 301 F.3d at 713-714; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

[12] Dr. Forehand reviewed the miner's treatment records and opined the miner had a "normal left ventricular ejection fraction" and no "findings on physical examination or chest x-ray [to] support a diagnosis of congestive heart failure." Claimant's Exhibit 10 at 4. The administrative law judge found the treatment records support Dr. Forehand's opinion that the miner does not have congestive heart failure. Decision and Order at 24.

Employer's arguments are a request that the Board reweigh the evidence,[13] which it is not empowered to do.[14] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the administrative law judge's finding that employer failed to rebut the presumed existence of legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 24-25.

We also affirm the administrative law judge's finding that employer failed to establish that "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 permissibly discredited the opinions of Drs. Rosenberg and Rasmussen on the cause of the miner's total disability because they did not diagnose legal pneumoconiosis, contrary to his finding that employer failed to disprove the disease. 20 C.F.R. §718.305(d)(1)(ii); *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 25-27.

[13] Employer argues the administrative law judge erred in calculating the miner's cigarette smoking history when discrediting Dr. Rosenberg's opinion. Employer's Brief at 8. Dr. Rosenberg did not attribute the miner's oxygenation impairment to his history of cigarette smoking, nor did the administrative law judge find Dr. Rosenberg relied on an inflated smoking history. Decision and Order at 24; Employer's Exhibits 2, 5. Employer has not explained how the alleged error undermines the administrative law judge's assessment of Dr. Rosenberg's opinion. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

[14] The administrative law judge also considered Dr. Rasmussen's opinion from the miner's prior claim that the miner's abnormal resting blood gas results are unrelated to his coal mine dust exposure and are due to pneumonia, pulmonary embolus, and elevated diaphragm. Decision and Order at 25; *see* Claimant's Exhibit 9. He found the opinion insufficient to rebut the presumption of legal pneumoconiosis because it was outweighed by Dr. Forehand's contrary and more recent opinion that the miner had legal pneumoconiosis. Decision and Order at 25. Because employer does not challenge this credibility finding, it is affirmed. *See Skrack*, 6 BLR at 1-711.

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