U.S. Department of Labor

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

BRB No. 19-0237 BLA

JOE O. WILLIAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ICG EAST KENTUCKY, LLC	)	
	)	DATE ISSUED: 04/15/2020
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 Awarding Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-05767) of Administrative Law Judge Steven D. Bell 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 August 17, 2015.

The administrative law judge credited claimant with 30.34 years of surface coal mine employment, including 20.23 years in conditions substantially similar to underground coal mine employment. He also found claimant has a total respiratory or pulmonary disability and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 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 argues the administrative law judge erroneously determined the miner had at least fifteen years of qualifying coal mine employment and is totally disabled and, therefore, erred in finding the Section 411(c)(4) presumption invoked. Employer further contends the administrative law judge erred in finding it did not rebut the presumption. Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs, did not file a response brief.

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.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, claimant must establish he had at least fifteen years of employment "in one or more underground coal mines" or in surface mines "in conditions substantially similar to those in underground mines." 30 U.S.C. §921(c)(4) (2012); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). "The conditions in a mine other than an underground mine will be considered 'substantially similar' to those in

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

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 5; 6; 7; 13 at 26, 31; Hearing Transcript at 13.

an underground mine if the claimant demonstrates that [he] was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

The administrative law judge found claimant worked in coal mine employment for 30.34 years, all at surface mines. Decision and Order at 8; Hearing Transcript at 17. He further found claimant established he was regularly exposed to coal mine dust during at least two-thirds of his coal mine employment, crediting him with 20.23 years of qualifying coal mine employment. *Id*.

Employer does not dispute that claimant had 30.34 years of coal mine employment, but challenges the finding that at least fifteen years occurred in conditions "substantially similar" to those in an underground coal mine. Employer's Brief at 13. Employer contends the administrative law judge did not adequately consider whether claimant met his burden to establish that the level, duration, and frequency of his coal mine dust exposure was substantially similar to that in an underground mine. *Id*. at 15.

Employer's argument mischaracterizes the applicable standard for assessing substantial similarity of dust conditions at underground and surface mines. Claimant is not required to prove the dust conditions aboveground were identical to those underground, *see* 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013), nor does he "have to prove that [he] was around surface coal dust for a full eight hours on any given day for that day to count." *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 481 (7th Cir. 2001); *see also Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664-65 (6th Cir. 2015). Claimant need only establish that he was "regularly exposed to coal-mine dust" while working at surface mines. 20 C.F.R. §718.305(b)(2).

Claimant testified he worked in the mines for thirty-five or forty years and spent thirty to thirty-five of those years driving a bulldozer. Hearing Transcript at 16. He "pushed coal" in an open-cab bulldozer for the first five or six years and would "crush it up with the tracks," which generated so much coal dust "[y]ou couldn't tell who [anyone] was." *Id*. at 22-23. Most of his work involved "moving rock and dirt off the coal," exposing him to coal mine dust two to three days per week. *Id*. at 20-21, 24. For two-thirds of his coal mine employment he operated a bulldozer without a cab and his clothes would be "filthy" from coal mine dust at the end of the day. *Id*. at 17, 21-22. Although the closed cabs minimized his coal mine dust exposure, some cabs were better sealed than others, and coal mine dust would still get inside the cab. *Id*. at 24.

Contrary to employer's contention, the administrative law judge permissibly relied on claimant's credible uncontested testimony detailing his working conditions to find claimant was regularly exposed to coal mine dust during at least the two-thirds of his employment when he worked in an open cab, constituting 20.23 years. *See Kennard*, 790

F.3d at 664 (claimant's "uncontested lay testimony" regarding his dust conditions "easily supports a finding" of regular dust exposure); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490 (6th Cir. 2014) (claimant's testimony that the conditions of his employment were "very dusty" sufficient to establish regular exposure); Decision and Order at 8; Employer's Brief at 15. As it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant has more than fifteen years of qualifying coal mine employment to invoke the Section 411(c)(4) presumption. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 4, 8.

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A 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. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh the relevant evidence supporting total disability against the 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 initially found claimant did not establish the existence of complicated pneumoconiosis and thus is not entitled to the Section 411(c)(3) irrebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.204(b)(1); Decision and Order at 24-25. He further found claimant did not establish total disability through pulmonary function or blood gas studies or with evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 26. He found disability established, however, by the medical opinions and the evidence overall. *See* 20 C.F.R. §718.204(b)(2), (iv).

The administrative law judge considered the medical opinions of Drs. Green, Raj, Tuteur, and Rosenberg, together with claimant's treatment records. Drs. Green and Raj opined claimant is totally disabled from a pulmonary standpoint. Director's Exhibit 13; Claimant's Exhibits 4, 5; Employer's Exhibits 4, 17, 19. Dr. Tuteur opined claimant is totally disabled due to rheumatoid arthritis, coronary artery disease, suboptimally controlled hypertension, and cervical and lumbar discogenic disease, which "resulted in a mild restriction to lung inflation, most likely due to rheumatoid pleural process." Employer's Exhibits 4 at 3-4; 17; 19. Dr. Rosenberg opined claimant is not disabled. Employer's Exhibits 5, 6, 14, 16, 18. The administrative law judge credited the opinions of Drs. Green and Raj, but discredited the opinions of Drs. Tuteur and Rosenberg and thus found claimant established total respiratory or pulmonary disability by a preponderance of

the medical opinions pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 27-28.

We reject employer's argument the administrative law judge erred in his consideration of Drs. Rosenberg's and Tuteur's opinions. Employer's Brief at 15. The administrative law judge found Dr. Rosenberg's opinion not well reasoned or documented because he based it in part on an incorrect assessment that claimant's most recent pulmonary function study dated February 8, 2018 was completely non-qualifying when the post-bronchodilator results were qualifying. Decision and Order at 27; Employer's Exhibit 14 at 2. The administrative law judge also found he failed to adequately address the March 25, 2017 qualifying exercise blood gas study. Decision and Order at 27; Employer's Exhibit 14 at 2. The administrative law judge found Dr. Tuteur's opinion not well reasoned or documented because he failed to adequately explain his assessment that claimant is totally disabled by several conditions, "result[ing] in a mild restriction to lung inflation most likely due to rheumatoid pleural process." Decision and Order at 28; Employer's Exhibit 4 at 3-4.

Employer asserts "[t]o give less weight to the opinions from Drs. Rosenberg and Tuteur for the stated reasons was in error." Employer's Brief at 16. The Board must limit its review to contentions of error that the parties specifically raise. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Because employer does not identify any specific error with regard to the determinations the opinions of Drs. Rosenberg and Tuteur are not well reasoned and documented, we affirm the administrative law judge's findings.

There is also no merit to employer's assertion the total disability opinions of Drs. Green and Raj are not credible because they are based on diagnoses of complicated pneumoconiosis "which was not found, or upon evidence [the administrative law judge] found insufficient to prove total pulmonary disability." Employer's Brief at 16. The administrative law judge acknowledged both doctors opined claimant is totally disabled due, in part, to complicated pneumoconiosis seen on his x-ray. Decision and Order at 27-28; Director's Exhibit 13 at 34; Claimant's Exhibit 4. As the administrative law judge observed, however, Drs. Green and Raj explained how the degree of impairment reflected on claimant's objective tests, particularly his exercise blood gas study results, independently supported their conclusions.

Dr. Green specifically stated while claimant's resting blood gas studies are non-qualifying, claimant is "totally disabled from a pulmonary capacity standpoint [for his job requiring moderate exertion] based on the findings of significant hypoxemia with exercise" as reflected on his exercise blood gas testing. Decision and Order at 27; Claimant's Exhibit

5. He further stated claimant has a moderate degree of lung restriction on pulmonary function testing, reflected by his reduced FEV1, FVC, and total lung capacity results, that also contributes to his disability. Decision and Order at 27; Claimant's Exhibit 5.

Dr. Raj similarly diagnosed total disability based on claimant's qualifying exercise blood gas study showing severe hypoxemia, abnormal pulmonary function study showing a moderate obstructive defect, and diminished physical capacity due to his shortness of breath. Decision and Order at 28; Claimant's Exhibit 4. He explained:

> [Claimant's] physical capacity is greatly diminished due to total disability resulting from pulmonary impairment. Patient gets short of breath after walking about 200 feet distance uphill. With such a reduced physical capacity resulting from pulmonary impairment, this patient cannot meet the exertional requirement of his last coal mine employment job.

Claimant's Exhibit 4.

Thus, contrary to employer's argument, the administrative law judge permissibly found their opinions reasoned and documented despite their "partial reliance" on diagnoses of complicated pneumoconiosis.[3] *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); Decision and Order at 28. Because it is supported by substantial evidence, we affirm the administrative law judge's finding the opinions of Drs. Green and Raj established total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Martin*, 400 F.3d at 305; Decision and Order at 28. We further affirm his finding that the evidence considered as a

[3] We reject employer's additional contention the administrative law judge failed to consider the extent Drs. Green and Raj were aware the Social Security Administration found claimant occupationally disabled due to rheumatoid arthritis. Employer's Brief at 16-17. The relevant issue at 20 C.F.R. §718.204 is whether claimant suffers from a disabling pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). Thus whether he also suffers from a disabling non-respiratory condition is irrelevant. *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."). To the extent employer asserts claimant's pulmonary disability is due to his rheumatoid arthritis, the etiology of the impairment is properly addressed under the disability causation element or rebuttal of the presumption of total disability due to pneumoconiosis. 20 C.F.R. §§718.204(c), 718.305(d)(1)(ii).

whole established total disability at 20 C.F.R. §718.204(b)(2). *See Shedlock*, 9 BLR at 1-198; Decision and Order at 28.

Because we have affirmed the administrative law judge's findings that claimant established over fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment, we affirm his determination claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(i)-(iii); Decision and Order at 14.

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

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

Clinical Pneumoconiosis

The administrative law judge found the x-ray, biopsy and computed tomography (CT) scan evidence established the existence of clinical pneumoconiosis and therefore did not rebut the presumption. 20 C.F.R. §§718.107, 718.202(a)(1), (2); Decision and Order at 30-32. As employer raises no challenge to these findings, they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710, 1-711 (1983). The administrative law judge further found the medical opinions do not rebut the existence of clinical pneumoconiosis. Decision and Order at 32; Employer's Brief at 16.

We reject employer's challenge to the administrative law judge's weighing of Drs. Rosenberg's and Tuteur's opinions.[5] As he observed, while Dr. Rosenberg initially opined

[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 is defined as "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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1).

[5] The administrative law judge also considered Drs. Green's and Raj's opinions that claimant has clinical pneumoconiosis and correctly observed neither opinion aids employer

claimant does not have clinical pneumoconiosis, he subsequently conceded claimant might have the disease. Employer's Exhibits 5, 6, 16, 18. Thus, contrary to employer's argument, the administrative law judge permissibly determined Dr. Rosenberg's opinion is insufficient to rebut the presumption. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473 (6th Cir. 2011) (employer must affirmatively establish the miner does not have pneumoconiosis); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting); Decision and Order at 32; Employer's Brief at 15.

Dr. Tuteur opined claimant does not have coal workers' pneumoconiosis of sufficient severity and profusion to produce clinical symptoms, abnormality on physical examination, a pulmonary function impairment, or radiographic change. Employer's Exhibits 4, 17, 19. He added that even if he assumed the presence of an interstitial process, other factors support the conclusion the changes are due to rheumatoid arthritis and substantially reduce the possibility they are due to coal workers' pneumoconiosis.[6] The administrative law judge permissibly discounted Dr. Tuteur's opinion as "unclear and equivocal" because he never actually stated claimant does not have clinical pneumoconiosis. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882 (6th Cir. 2000); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-7 (6th Cir. 1995); Decision and Order at 32. He also permissibly discredited Dr. Tuteur's opinion because he relied in part on his own negative x-ray interpretation not designated as evidence, a finding employer does not contest.[7] *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (en banc); *Skrack*, 6 BLR at 1-711; Decision and Order at 32. As it is supported by substantial evidence, we affirm the administrative law judge's determination that the medical opinion evidence and

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in meeting its burden on rebuttal. Decision and Order at 32. Therefore, we need not address employer's arguments concerning the weighing of these opinions. *See Shinseki*, 556 U.S. at 413; Employer's Brief at 16-17.

[6] Dr. Tuteur stated residual articular manifestation of bilateral wrist synovial thickening is still present, lending support to the diagnosis of rheumatoid arthritis. Employer's Exhibits 17, 19. The identification of nodular densities as well as pleural thickening by computed tomography scan further supports the diagnosis of pulmonary parenchymal pleural manifestation of rheumatoid arthritis. *Id.* Finally, he stated the presence of pleural changes serves to substantially reduce the possibility that the interstitial pulmonary process is due to coal workers' pneumoconiosis as opposed to another cause. *Id.*

[7] Dr. Tuteur stated he personally reviewed an x-ray dated March 9, 2016, and saw absolutely no interstitial changes consistent with a coal dust related pulmonary process. He added the pleural changes may be associated with claimant's 1999 pneumonia and/or a manifestation of rheumatoid pleural disease. Employer's Exhibit 4.

the evidence of record as a whole does not rebut the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); *see Martin*, 400 F.3d at 305.

Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing claimant does not have pneumoconiosis.

Total 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 31-32. Dr. Tuteur opined claimant does not have clinical pneumoconiosis of sufficient severity and profusion to produce pulmonary impairment. Employer's Exhibit 4. The administrative law judge rationally discounted Dr. Tuteur's opinion because he relied on his own negative x-ray interpretation to determine claimant has little to no clinical pneumoconiosis, contrary to the administrative law judge's finding that the x-ray evidence, including the March 9, 2016 x-ray Dr. Tuteur read, establishes the existence of the disease.[8] *See Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013); *see also Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 34.

Dr. Rosenberg stated claimant's disabling restrictive impairment is not due to clinical pneumoconiosis because restriction would not be seen in any profusion of simple pneumoconiosis and would only be associated with complicated pneumoconiosis. Employer's Exhibit 6 at 18. The administrative law judge permissibly discredited his opinion as inadequately explained in light of the premises underlying the Act that even simple pneumoconiosis can be disabling and as inconsistent with the Department of Labor's recognition that "both restrictive and obstructive lung disease may fall within the definition of pneumoconiosis . . ." 65 Fed. Reg 79,920, 79,937 (Dec. 20, 2000); *see* 20 C.F.R. §718.201(a)(1), (b); *A & E Coal Co. v. Adams*, 694 F.3d 798, 802 (6th Cir. 2012) (an administrative law judge is entitled to look to the preamble to assess a physician's credibility); *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1119 (6th Cir. 1987); Decision

[8] The administrative law judge noted Drs. Crum and Kendall, both Board-certified radiologists and B readers, read the March 9, 2016 x-ray as positive for pneumoconiosis. Decision and Order at 31; Director's Exhibit 13; Employer's Exhibit 1. There are no contrary readings of this x-ray in the record, as Dr. Tuteur's negative reading was not submitted or designated as x-ray evidence. Decision and Order at 10, 17.

and Order at 34. The administrative law judge permissibly concluded, therefore, that Dr. Rosenberg's opinion was not well reasoned, entitled to "little weight," and thus insufficient to prove that no part of claimant's impairment was due to clinical pneumoconiosis.[9] *See Sterling*, 762 F.3d at 490-91; *Adams*, 694 F.3d at 801-02; Decision and Order at 35.

The administrative law judge's finding employer failed to establish that no part of claimant's total disability was caused by pneumoconiosis is therefore affirmed. 20 C.F.R.

[9] Because employer failed to rebut that claimant has clinical pneumoconiosis and is disabled by it, we need not address employer's arguments relevant to rebuttal of the existence of legal pneumoconiosis.

§718.305(d)(1)(ii). Because claimant invoked the Section 411(c)(4) presumption and employer failed to rebut it, claimant is entitled to benefits.

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