U.S. Department of Labor

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

BRB No. 20-0031 BLA

LEE ALLEN HORROCKS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HIGH POWER ENERGY	)	
	)	
Employer	)	
and	)	
	)	DATE ISSUED: 02/26/2021
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Carrier-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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

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

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for Carrier.

Michelle S. Gerdano (Elena S. Goldstein, Deputy 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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Carrier appeals Administrative Law Judge Natalie A. Appetta's Decision and Order Awarding Benefits (2017-BLA-05916) rendered on a claim filed on January 4, 2016 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with 15.785 years of qualifying coal mine employment and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant 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) (2018). She further found Carrier did not rebut the presumption and awarded benefits.

On appeal, Carrier challenges the constitutionality of the Section 411(c)(4) presumption. It further contends the administrative law judge erred in crediting Claimant with at least fifteen years of qualifying coal mine employment and therefore erred in determining he invoked the Section 411(c)(4) presumption. Carrier also argues she erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the administrative law judge properly credited Claimant with at least fifteen years of qualifying coal mine employment. The Director also urges the Benefits Review Board to reject Carrier's challenge to the constitutionality of the Section 411(c)(4) presumption.[2]

[1] Section 411(c)(4) of the Act 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.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established total disability. 20 C.F.R. §718.204(b)(2); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 35.

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.[3] 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).

Constitutionality of the Affordable Care Act and the Section 411(c)(4) Presumption

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Carrier contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Carrier's Brief at 7-8. Carrier cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*.

The United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, the United States Supreme Court upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). We therefore reject Carrier's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case.

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

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines or in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 31.

Board will uphold an administrative law judge's determination if it is based on a reasonable method of calculation and supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The administrative law judge found 15.785 years of qualifying coal mine employment from 1967 to 1995. Decision and Order at 29-32. Carrier argues the administrative law judge erred in crediting Claimant with 2.94 years of coal mine employment for the years 1979-1982.[4] Carrier's Brief at 6-10. We disagree.

The regulations define "year" as "a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'"[5] 20 C.F.R. §725.101(a)(32); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). Based on Claimant's employment history form, Social Security Administration (SSA) earnings records, and hearing testimony, the administrative law judge "credit[ed] his representation that he was employed by an underground coal mine for a full year in 1979" and found he established the "threshold element" of underground coal mine employment for an entire calendar year for 1980 through 1982.[6] Decision and Order at 30-31; Director's Exhibit 4.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant established 0.75 of a year of coal mine employment in 1967, one year in 1977, one year in 1978, 0.015 of a year in 1983, ten years from 1985 to 1994, and 0.08 of a year in 1995, for a total of 12.845 years of coal mine employment. *See Skrack*, 6 BLR at 1-711; Decision and Order at 29-31.

[5] If the threshold one-year period is met, "it must be presumed, in the absence of evidence to the contrary, that the miner spent 125 working days in such employment[,]" in which case the miner would be entitled to credit for one full year of employment. 20 C.F.R. §725.101(a)(32)(ii).

[6] With respect to the administrative law judge's finding Claimant had full calendar years of employment in 1980, 1981, and 1982, she noted Claimant's SSA earnings statement indicates income with Armco, Inc. from 1980 through 1982, as well as a nominal amount in 1983. Decision and Order at 31. She also noted Claimant's Employment History form alleges coal mine employment with Armco throughout each of these years. *Id*. at 30; *see* Director's Exhibit 4 (identifying employment with Armco "from 1977 to 1984").

Having found Claimant established a full calendar year of employment in each year from 1979 to 1982, the administrative law judge next determined whether he worked for at least 125 days during each of these years. Decision and Order at 30-31. She compared Claimant's yearly income, as set forth in his SSA earnings statement, with the mine industry's average daily earnings as reported in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual* to find he worked less than 125 days for each of these years.[7] *Id.* She therefore credited him with "a fractional year based on the ratio of the actual number of days worked to 125," and found he had a total of 2.94 years of employment from 1979 to 1982.[8] 20 C.F.R. §725.101(a)(32)(i); Decision and Order at 30-31.

Carrier contends the administrative law judge erred by relying on the formula at 20 C.F.R. §725.101(a)(32)(iii) to "presum[e] 125 days equals a calendar year." Carrier's Brief at 6-10. Carrier misreads the administrative law judge's decision. As the Director notes and as outlined above, the administrative law judge first determined Claimant established full calendar years of employment for each year from 1979 to 1982 and only then addressed whether the evidence established 125 working days of coal mine employment. *See Mitchell*, 479 F.3d at 334-36; 20 C.F.R. §725.101(a)(32); Director's Brief at 1-2 (unpaginated). Employer raises no challenge to the administrative law judge's specific explanations for finding Claimant was employed for full calendar years in each year from 1979 to 1982, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983), and we discern no error in the administrative law judge's subsequent method of calculating the number of days and years of employment with which Claimant should be credited during that period. *See Mitchell*, 479 F.3d at 334-36; *Clark*, 22 BLR at 1-280.

Because the administrative law judge used a reasonable calculation method, we affirm her finding that Claimant established 2.94 years of underground coal mine employment from 1979 to 1982. Decision and Order at 30-31. Because Carrier does not otherwise challenge the administrative law judge's coal mine employment calculations, we

[7] Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*, entitled "Average Wage Base," contains the average daily earnings of employees in coal mining and yearly earnings for those who worked 125 days during a year and is referenced in 20 C.F.R. §725.101(a)(32)(iii).

[8] The administrative law judge found 0.53 of a year in 1979 (($5,800.10 ÷ $87.03 = 66.6 days) ÷ 125); 0.69 of a year in 1980 (($7492.12 ÷ $87.42 = 85.7 days) ÷ 125); 0.80 of a year in 1981 (($9,668.27 ÷ $96.80 = 99.88 days) ÷ 125); 0.92 of a year in 1982 (($11,648.79 ÷ $101.59 = 115 days) ÷ 125). Decision and Order at 30-31.

affirm her findings that Claimant established over fifteen years of qualifying coal mine employment and invoked the Section 411(c)(4) presumption. *See Mitchell*, 479 F.3d at 334-36; *Muncy*, 25 BLR at 1-27; *Clark*, 22 BLR at 1-280.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Carrier to establish he has neither legal nor clinical pneumoconiosis,[9] 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 Carrier failed to establish rebuttal by either method.[10]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Carrier 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 Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered the medical opinions of Drs. Basheda and Zaldivar, who both opined Claimant has chronic obstructive pulmonary disease (COPD)/emphysema, asthma, and bronchiectasis caused entirely by smoking and unrelated to coal mine dust exposure. Decision and Order at 37-42; Carrier's Exhibits 5, 6, 11, 15, 16. The administrative law judge found neither physician's opinion persuasive because she concluded they did not adequately explain why Claimant's coal mine dust exposure also did not contribute to these impairments. Decision and Order at 38.

Carrier argues the administrative law judge ignored that Drs. Zaldivar and Basheda diagnosed bronchiectasis unrelated to coal dust exposure, which Dr. Zaldivar opined causes permanent lung damage and irreversible obstruction. Carrier's Brief at 23-24, *citing*

[9] "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).

[10] The administrative law judge found Carrier disproved clinical pneumoconiosis. Decision and Order at 42.

Carrier's Exhibit 16 at 54-55. We disagree. Although Drs. Zaldivar and Basheda denied any correlation between coal mine dust exposure and bronchiectasis, the administrative law judge noted Dr. Sood disagreed, stating "bronchiectasis is seen on high resolution CT-scans of chest in coal dust exposed workers both with and without medical [coal workers' pneumoconiosis]." Decision and Order at 38; Claimant's Exhibit 4. She accurately noted Dr. Sood quoted an abstract of a medical study in which the authors state bronchiectasis is influenced by coal dust exposure and permissibly found the study supports Dr. Sood's conclusion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 38 & n.38; Claimant's Exhibit 4 at 21-22. Although Drs. Zaldivar and Basheda reviewed Dr. Sood's opinion, neither addressed the study. Carrier's Exhibits 15, 16. The administrative law judge therefore permissibly discredited their opinions that there is no correlation between coal mine dust exposure and bronchiectasis. *See Clark*, 12 BLR at 1-155; Decision and Order at 38.

She further permissibly discredited Drs. Basheda's and Zaldivar's opinions for not adequately explaining why they determined coal dust exposure did not have an additive effect in Claimant's case. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); Decision and Order at 38-41. Although they explained how other conditions not associated with coal dust exposure account for Claimant's condition, the presumption is Claimant has pneumoconiosis, i.e., a chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §§718.201, 718.305(c)(1). The physicians stated coal dust exposure did not play a role in Claimant's condition but failed to address to the administrative law judge's satisfaction the basis on which the evidence established their conclusion. Decision and Order at 38-41; *see* Carrier's Exhibits 5, 6, 11, 15, 16

Because the administrative law judge permissibly discredited the opinions of Drs. Basheda and Zaldivar, we affirm her determination that Carrier did not disprove Claimant has legal pneumoconiosis.[11] *See* 20 C.F.R. §718.305(d)(1)(i)(A).

[11] Because we affirm the administrative law judge's decision to discredit the opinions of Drs. Basheda and Zaldivar, the only opinions supportive of Carrier's burden of proof, we need not address its arguments regarding the opinions of Drs. Celko, Krefft and Sood that Claimant has legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Carrier's Brief at 11-22.

Disability Causation

The administrative law judge found Carrier failed to establish that "no part of the [M]iner'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). Carrier raises no specific challenge to this determination, which we affirm. *See Skrack*, 6 BLR at 1-711. Regardless, the administrative law judge permissibly discredited the disability causation opinions of Drs. Basheda and Zaldivar because they were premised on the physicians' rejected view that Claimant does not have legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (such an opinion "may not be credited at all" on disability causation absent "specific and persuasive reasons" for concluding the physician's view on disability causation is independent of his or her erroneous opinion on pneumoconiosis); Decision and Order at 43. We therefore affirm the administrative law judge's determination that Carrier failed to establish no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *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.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge