U.S. Department of Labor

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

BRB No. 21-0251 BLA

JOHNNY WILSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY NEW MEXICO SERVICES	)	
	)	
and	)	DATE ISSUED: 01/27/2023
	)	
Self-Insured Through PEABODY ENERGY CORPORATION	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Amended Decision and Order Awarding Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Paul E. Frampton (Bowles Rice LLP), Charleston, West Virginia, for Employer.

Jared L. Bramwell (Kelly & Bramwell, P.C.), Draper, Utah, for claimant.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Richard M. Clark's Amended Decision and Order Awarding Benefits (2018-BLA-06321)[1] on a claim filed on April 6, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with at least nineteen years of surface coal mine employment, as the parties stipulated, and found his coal mine employment occurred in conditions substantially similar to those in an underground mine. In addition, he accepted the parties' stipulation that Claimant is totally disabled, 20 C.F.R. §718.204(b)(2), and thus found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4)[2] of the Act, 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer contends the ALJ erred in finding Claimant's surface coal mine employment took place in conditions substantially similar to those in an underground mine. It also contends the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ'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 Assocs., Inc.*, 380 U.S. 359 (1965).

[1] The ALJ's original Decision and Order Awarding Benefits was amended solely to correct a clerical error as to the name of the responsible operator. Decision and Order at 1 n.1.

[2] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled 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 Tenth Circuit because Claimant performed his coal mine employment in New Mexico. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibits 4-7.

Invocation of the Section 411(c)(4) Presumption: Substantially Similar Surface Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines or surface coal mines in conditions "substantially similar" to underground mines. 20 C.F.R. §718.305(b)(1)(i). Conditions at a surface mine will be considered substantially similar to those in an underground mine if Claimant demonstrates he was "regularly exposed to coal mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90 (6th Cir. 2014).

The ALJ accepted the parties' stipulation that Claimant had at least nineteen years of coal mine employment. Decision and Order at 2, 6, 13. Noting that all of Claimant's employment was performed at surface mines, the ALJ considered Claimant's evidence regarding his working conditions and determined it established Claimant's work "regularly exposed him to coal mine dust," so Claimant established "at least [nineteen] years of qualifying coal mine employment." Decision and Order at 8.

Employer argues the ALJ erred in finding Claimant's exposure to coal mine dust in performing his jobs as a truck driver, track dozer operator, and supervisor was equivalent to that of an underground miner. Employer's Brief at 6-7. It further contends the ALJ erred in finding Claimant's work as a supervisor involved significant dust exposure because he did not consider Claimant's testimony that he spent an hour at the beginning and end of his shift doing paperwork, and because he spent part of his time driving a pickup truck between mine sites. Employer's Brief at 2-6. We disagree.

As the ALJ observed, in describing his job duties as a truck driver, Claimant testified coal mine dust was sucked into the cab of the truck through the doors, and he was unable to run the air conditioning because it also sucked coal mine dust into the cab. Hearing Tr. at 43. The cab and his clothing were covered in coal mine dust at the end of the shift, and when he blew his nose, it produced "solid black." *Id.* at 43-44.

Claimant testified that operating a track dozer involved similar levels of coal mine dust exposure. *Id.* at 45. The air conditioning did not function, so he had to operate the track dozer with the cab doors open, which allowed dust into the cab. *Id.*

Claimant testified working as a supervisor also exposed him to a substantial amount of coal mine dust. *Id.* at 47. His work required that he repair equipment at the coal dump while coal was actively being dumped. *Id.* When not repairing equipment, Claimant was in the mine pit where he was exposed to dust from mining operations, passing trucks, and

the motor graders blading the road. *Id.* at 48. He testified he was as dirty at the end of his shift as when he drove a truck or operated equipment. *Id.*

An ALJ is granted broad discretion in evaluating the credibility of the evidence of record, including witness testimony. *See Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986). Contrary to Employer's contention, Claimant need establish only that the working conditions "regularly" exposed him to coal mine dust. 20 C.F.R. §718.305(b)(2); *see Duncan*, 889 F.3d at 304 (rejecting the argument that Claimant must provide evidence of "the actual dust conditions" and citing with approval the Department of Labor's position that "dust exposure evidence will be inherently anecdotal"); *Kennard*, 790 F.3d at 664 (claimant's "uncontested lay testimony" regarding the dust conditions he experienced "easily supports a finding" of regular dust exposure); *Sterling*, 762 F.3d at 490 (claimant's testimony that the conditions of his employment were "very dusty" sufficient to establish regular exposure).

Employer has shown no error in the ALJ's reliance on Claimant's testimony to support a finding that he was regularly exposed to coal mine dust while working as a truck driver, track dozer operator, and supervisor. *See Mays*, 176 F.3d at 756; *Lafferty*, 12 BLR at 1-192. We therefore affirm the ALJ's finding that Claimant had at least fifteen years of qualifying coal mine employment and, consequently, his determination that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.305(b)(1)(i); *see Muncy*, 25 BLR at 1-21; *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497, 1-501 (1979); Decision and Order at 8, 13-14.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[4] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as

[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). 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).

defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method. Decision and Order at 17-18.

As the ALJ observed, Employer failed to timely submit evidence supporting its burden to rebut the Section 411(c)(4) presumption. Decision and Order at 2 n.2, 17. Employer instead argues on appeal that the opinions of Drs. James, Gottschall, and Sood are insufficient to establish the existence of pneumoconiosis. Employer's Brief at 7-15. However, because Claimant invoked the Section 411(c)(4) presumption, "there is no need for [him] to prove the existence of pneumoconiosis; instead, pneumoconiosis arising from coal mine employment is presumed, subject only to rebuttal by [Employer]." *W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018). Thus, we affirm the ALJ's finding that Employer failed to disprove pneumoconiosis.

The ALJ 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). As Employer submitted no evidence, the ALJ found Employer did not disprove disability causation. Decision and Order at 17-18.

Employer asserts the ALJ erred in not finding Dr. James's opinion disproves disability causation. Employer's Brief at 7-8, 13-15. We disagree.

Dr. James diagnosed Claimant with chronic bronchitis, restrictive lung disease, hypoxemia, and hypercapnia. Claimant's Exhibit 5 at 2. Contrary to Employer's contention, Dr. James did not purport to rule out pneumoconiosis as a contributing factor to Claimant's impairment but rather opined that, while coal mine dust is a significant contributing factor to Claimant's bronchitis, he could not "determine with a reasonable degree of medical certainty that his chronic bronchitis is a contributing factor in his total disability." *Id.* at 3. Though Dr. James opined Claimant's obesity is a contributing cause of his restrictive lung disease and hypercapnia, and bronchitis was not a likely cause of his hypoxemia, he did not state that pneumoconiosis did not contribute to Claimant's disability. *Id.* at 2. Employer has the duty to affirmatively disprove disability causation. 20 C.F.R. §718.305(d)(1)(ii); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015). We therefore affirm the ALJ's determination that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge