U.S. Department of Labor

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

BRB No. 19-0291 BLA

GARY GENTRY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ROXANNA TRANSPORT, INCORPORATED	)	
	)	
	)	DATE ISSUED: 06/05/2020
and	)	
	)	
KENTUCKY EMPLOYERS' MUTUAL INSURANCE	)	
	)	
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for employer.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its carrier (employer) appeal the Decision and Order Awarding Benefits (2017-BLA-05436) of Administrative Law Judge John P. Sellers, III, 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 claim filed on December 3, 2015.

The administrative law judge credited claimant with at least thirty-four years of coal mine employment,[1] either aboveground at an underground coal mine or in surface coal mine employment in conditions substantially similar to those in an underground coal mine. Because he also found the evidence established a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), he found claimant 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 argues that the administrative law judge erred in admitting claimant's post-hearing x-ray evidence. Employer also contends the administrative law judge erred in finding claimant established at least fifteen years of qualifying coal mine employment and therefore erred in finding he invoked the Section 411(c)(4) presumption. Employer also argues the administrative law judge erred in finding it did not rebut the presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[3]

The Board's scope of review is defined by statute. We must affirm the 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 into the Act by 30

[1] Claimant's coal mine employment occurred in Kentucky. Hearing Transcript at 15. Accordingly, this case arises within the jurisdiction 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) of the Act 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 impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] We affirm as unchallenged the administrative law judge's finding of a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 361-62 (1965).

Admission of Evidence

Employer initially argues the administrative law judge erred in admitting Dr. Crum's positive interpretations of x-rays taken on July 28, 2016, and August 25, 2016.

Employer submitted negative interpretations of x-rays taken on July 28, 2016, and August 25, 2016, as its two designated x-ray interpretations in support of its affirmative case under the evidentiary limitations. 20 C.F.R. §725.414(a)(3)(i); Employer's Exhibits 3, 4. At the May 1, 2018 hearing, the administrative law judge granted claimant an additional sixty days to submit rebuttal readings of these x-rays. Hearing Transcript at 8-9.

In his post-hearing brief, claimant requested that the administrative law judge exclude employer's July 28, 2016 x-ray interpretation because employer had not made the x-ray available for review. In order to address this evidentiary issue, the administrative law judge held a conference call on December 20, 2018. During the call, employer agreed to attempt to obtain an undamaged copy of the July 28, 2016 x-ray. The administrative law judge provided employer thirty days to locate and provide claimant with an undamaged copy of the x-ray. In addition to allowing claimant to submit a rebuttal reading of the July 28, 2016 x-ray, he provided claimant with an additional thirty days to submit a rebuttal reading of the August 25, 2016 x-ray.

In a letter dated January 18, 2019, claimant informed the administrative law judge he had received a copy of the July 28, 2016 x-ray. Claimant explained he had sent the x-ray to a physician for interpretation and would file the rebuttal x-ray reading as soon as he received it. Thereafter, by letter dated January 26, 2019, claimant submitted Dr. Crum's positive interpretations of the July 28, 2016 and August 25, 2016 x-rays.

Employer filed an objection to the admission of this evidence, arguing it was untimely submitted. Specifically, employer argued claimant's x-ray evidence was due on January 20, 2019, but not submitted until January 26, 2019.

On February 7, 2019, the administrative law judge held another conference call to address employer's objections and to provide the parties additional time to file supplemental post-hearing briefs. As to employer's evidentiary objections, he noted that although claimant did not submit his rebuttal x-ray evidence by the January 20, 2019 deadline, claimant notified the administrative law judge by letter dated January 18, 2019, that claimant's evidentiary submissions were forthcoming and filed this evidence shortly thereafter. The administrative law judge therefore overruled employer's objection and

admitted claimant's rebuttal x-ray evidence into the record. He also provided the parties fourteen days in which to file supplemental post-hearing briefs.

On appeal, employer renews its objection to the admission of claimant's rebuttal evidence, arguing claimant did not submit his evidence until seven days after the thirty day extension the administrative law judge granted claimant on December 20, 2018. Employer's Brief at 5-9 (unpaginated). An administrative law judge exercises broad discretion in resolving 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). A party seeking to overturn the disposition of an 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). Employer has not satisfied its burden.

Although claimant did not submit his rebuttal evidence within the thirty day deadline the administrative law judge set, it was within the administrative law judge's discretion to keep the record open until he admitted claimant's rebuttal x-ray evidence. Moreover, as employer acknowledges, claimant's efforts to obtain an interpretation of July 28, 2016 x-ray were delayed by employer's failure to provide claimant with a copy of the x-ray.[4] Employer's Brief at 8 (unpaginated). The administrative law judge also provided employer with an opportunity to address claimant's rebuttal x-ray evidence in a supplemental post-hearing brief. Consequently, under the facts of this case, we hold the administrative law judge did not abuse his discretion in admitting claimant's rebuttal x-ray evidence. *Blake*, 24 BLR at 1-113; Claimant's Exhibits 1, 2.

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

Employer next argues that the administrative law judge erred in finding claimant had sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption. Section 411(c)(4) requires at least fifteen years of employment, either in "underground coal mines," or in "coal mines other than underground coal mines" in

[4] Employer notes that because the August 25, 2016 x-ray was not damaged, claimant could have submitted its rebuttal reading of this x-ray at an earlier date. After obtaining a copy of the July 28, 2016 x-ray, claimant submitted both the July 28, 2016 and August 25, 2016 x-rays to Dr. Crum for his review. Claimant's Exhibits 1, 2. Employer has not explained how it was prejudiced by claimant's waiting to have the August 25, 2016 x-ray read until it was able to obtain an undamaged copy of the July 28, 2016 x-ray. Moreover, on December 20, 2018, the administrative law judge provided claimant with a thirty day extension to submit its rebuttal readings of both x-rays, not just the July 28, 2016 x-ray.

"substantially similar" conditions to those in an underground mine. Section 718.305(b)(2) provides that "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

The administrative law judge noted claimant ran a bulldozer, loaded and drove a truck, and hauled coal. Decision and Order at 15; Employer's Exhibit 2 at 11-12; Hearing Transcript at 14. Claimant testified that he worked as a bulldozer operator at a surface mine from 1980 to 1982. Hearing Transcript at 14. Thereafter, claimant testified he drove a truck until 2011. As a truck driver, claimant loaded and hauled coal from both surface and underground mines, estimating he hauled coal from underground mines approximately eighty-five percent of the time. Hearing Transcript at 29-32.

The administrative law judge accurately noted a miner who works aboveground at an underground mine need not establish the work conditions there were substantially similar to those in an underground mine. *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058-59 (6th Cir. 2013); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011); Decision and Order at 15. The administrative law judge therefore correctly found claimant's work as a truck driver aboveground at underground mine sites constituted qualifying coal mine employment.

The administrative law judge next addressed whether claimant's work at surface mines also constituted qualifying coal mine employment. The administrative law judge noted claimant testified he was exposed to coal dust every day when he was working as a truck driver.[5] Decision and Order at 16; Hearing Transcript at 15; Employer's Exhibit 2 at 13. The administrative law judge further noted claimant testified he was also exposed to coal dust every day when he was operating a bulldozer at surface mines. Decision and Order at 16; Hearing Transcript at 14. The administrative law judge credited claimant's "uncontested testimony" and found claimant was regularly exposed to coal mine dust while hauling coal and working a bulldozer at the surface mines. Decision and Order at 16.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Cumberland River Coal Co. v. Banks*, 690 F.3d

[5] The administrative law judge noted claimant loaded his coal truck himself with an end loader. Hearing Transcript at 14-15. Claimant testified coal dust would come up when he loaded the coal onto the end loader. *Id.* at 28. Claimant testified it took him from fifteen to thirty minutes to load his truck with coal. *Id.* at 28-29. Claimant indicated he hauled ten to twelve loads a day. *Id.* at 29.

477 (6th Cir. 2012); *Gray v. SLC Coal Co*., 176 F.3d 382 (6th Cir. 1999). The Board cannot substitute its inferences for those of the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Because it is based on substantial evidence, we affirm the administrative law judge's finding that claimant's work as a truck driver and bulldozer operator at surface mines constitutes qualifying coal mine employment.[6] 20 C.F.R. §718.305(b)(2); *see Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490-91 (6th Cir. 2014) (claimant need only establish regular exposure to coal dust to prove substantially similar conditions).

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm his determination that claimant invoked the Section 411(c)(4) presumption.

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing claimant has neither legal nor clinical pneumoconiosis,[7] or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 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.

The administrative law judge found employer failed to establish claimant does not have clinical pneumoconiosis. Decision and Order at 17-21. He also found employer

[6] Because the administrative law judge found claimant's work as a truck driver and bulldozer operator, at both underground and aboveground mine sites, constituted qualifying coal mine employment, he credited claimant with at least fifteen years of qualifying coal mine employment. Moreover, claimant testified he also worked underground as a shuttle car operator for Scotia Coal Company from 1973 to 1976. Hearing Transcript at 13. Thus, evidence in the record arguably supports additional qualifying coal mine employment.

[7] "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).

failed to establish claimant does not have legal pneumoconiosis. *Id.* at 21-23.

Employer contends if claimant's rebuttal x-ray evidence had been excluded, it would have successfully rebutted the presumptions of both clinical and legal pneumoconiosis. Employer's Brief at 10-11 (unpaginated). However, as set forth above, we have rejected employer's argument that the administrative law judge erred in admitting claimant's rebuttal x-ray evidence. Because employer does not allege any other error, we affirm the administrative law judge's finding that employer did not rebut the existence of clinical pneumoconiosis or legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Further, because it is unchallenged on appeal, we affirm the administrative law judge's determination that employer failed to establish no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis and affirm the award of benefits. *See* 20 C.F.R. §718.305(d)(1)(ii); *Skrack*, 6 BLR at 1-711.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge