U.S. Department of Labor

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

BRB No. 19-0154 BLA

BOBBY J. HALL (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PLOWBOY COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 03/10/2020
ARROWPOINT CAPITAL	)	
	)	
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 Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-05048) of Administrative Law Judge Lauren C. Boucher, on a subsequent

claim filed on August 20, 2013,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge determined claimant[2] established 16.56 years of underground coal mine employment and a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). Thus, she found claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §725.309. The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding claimant established at least fifteen years of coal mine employment to invoke the Section 411(c)(4) presumption. Employer also contends the administrative law judge erred in finding the presumption unrebutted. Neither claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief.[4]

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.[5] 33 U.S.C.

[1] On October 19, 1992, the district director denied claimant's prior claim for failure to establish any element of entitlement. Director's Exhibit 1.

[2] In a December 20, 2019 letter, Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, advised the Board claimant died on December 12, 2019.

[3] Under Section 411(c)(4) of the Act, there is a rebuttable presumption claimant 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 was totally disabled by a respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established total disability and a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2); 725.309; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment was in Virginia. *See Shupe v. Director,*

§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).

Invocation of the Section 411(c)(4) Presumption
Qualifying Coal Mine Employment

Claimant bears the burden of establishing the length of coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-711 (1985). The Board will uphold the administrative law judge's determination if it is based on a reasonable method of computation and is supported by substantial evidence in the record. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

Relying on claimant's employment history form and company records submitted to the Department of Labor, the administrative law judge calculated the beginning and ending dates of claimant's employment with Grace Coal Company from May 15, 1982 through November 15, 1985, Big Track Coal from January 20, 1986 through January 31, 1986, and employer from March 1, 1988 through May 29, 1989. Decision and Order at 21; Director's Exhibits 6-8. For the remainder of claimant's coal mine employment, the administrative law judge indicated that she could not determine the precise beginning and ending dates and therefore used the formula at 20 C.F.R. §725.101(a)(32)(iii). Decision and Order at 21. She compared claimant's annual coal mine employment earnings reported in his Social Security Administration (SSA) earnings record with the average yearly earnings of employees in coal mining, as reported in Exhibit 610 of the Black Lung Benefits Act Procedure Manual. *Id*. Using this method, she prepared a chart calculating the full and partial years of claimant's coal mine employment. *Id*. at 22-23. The administrative law judge found claimant established 16.56 years of underground coal mine employment from 1964 through 1989. *Id*. at 23.

Employer challenges the administrative law judge's finding of 16.56 years of coal mine employment, preparing a chart in its brief calculating claimant's coal mine employment as 14.45 years. Employer's Brief at 4-5. Employer first alleges claimant worked only 42 percent of the year in 1989 and should be credited with 0.42 years. *Id*. at 6. We reject employer's argument as the administrative law judge credited claimant with .41 years of coal mine employment in 1989, which is less than employer calculates. *See*

OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 5 n.3; Director's Exhibit 1.

Shinseki v. Sanders, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference"); Decision and Order at 23.

Additionally, employer appears to contend that the administrative law judge improperly credited claimant with more than a year of coal mine employment in each of 1979 and 1981. Employer's Brief at 6. Because the SSA earnings records indicate claimant worked for multiple coal mine operators in those years, employer asserts the "overage" in 1979 and 1981 must be deducted from his years of coal mine employment. We disagree. The regulations define a "year" of coal mine employment as "a period of one calendar year (365 days, 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.'" 20 C.F.R. §725.101(a)(32). Contrary to employer's argument, the administrative law judge did not credit claimant with more than one year of coal mine employment in 1979 or 1981. Decision and Order at 22. Nor has employer shown there is any "overage" to deduct. Employer's own calculation estimates one year of coal mine employment in each of 1979 and 1981. Employer's Brief at 5. The administrative law judge similarly acknowledged claimant worked for multiple employers in 1979 and 1981 and had income well over the 125-day average for coal miners. Decision and Order at 22. Consequently, she permissibly credited him with a full year of coal mine employment in each of those years. 20 C.F.R. §725.101(a)(32); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007).

Although employer further generally contends claimant had less than fifteen years of coal mine employment, it does not identify any additional error or explain why the administrative law judge's method of calculating claimant's length of coal mine employment was unreasonable. *See Muncy*, 25 BLR at 1-27. 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). Thus, we affirm the administrative law judge's finding that claimant established 16.56 years of coal mine employment. *See Sarf*, 10 BLR at 1-120-21; Decision and Order at 23. We also affirm, as unchallenged, her determination that all of claimant's coal mine employment was underground. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 23. Thus, we affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. Decision and Order at 24.

Rebuttal of Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish he had neither clinical nor legal pneumoconiosis[6] 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 disproved legal pneumoconiosis but not clinical pneumoconiosis, and did not establish that claimant's respiratory disability was unrelated to clinical pneumoconiosis. Thus she found employer did not rebut the presumption by either method.

Clinical Pneumoconiosis

The administrative law judge considered readings of five x-rays dated January 9, 2013, October 4, 2013, January 21, 2014, April 23, 2014, and March 28, 2018. Decision and Order at 26-27. All of the readings were by physicians dually-qualified as B-readers and Board-certified radiologists. The administrative law judge gave equal weight to the readings based on the physicians' qualifications. *Id.* at 28. She found the October 4, 2103 x-ray positive for pneumoconiosis, crediting Drs. DePonte's and Seaman's positive readings over Dr. Alexander's negative reading. She found the remaining x-rays in equipoise because each had one negative and one positive reading by a dually qualified radiologist. The administrative law judge concluded "the preponderant weight of the x-ray evidence is positive for pneumoconiosis." *Id.* at 29.

Employer states the administrative law judge merely counted the number of positive readings versus negative readings in finding the October 4, 2013 x-ray positive and did not rationally explain her determination. Employer's Brief at 7. We disagree. The administrative law judge permissibly conducted both a qualitative and quantitative analysis of the x-ray evidence, taking into consideration the physicians' qualifications and the number of readings of each film. *See also Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256 (4th Cir. 2016). She permissibly found the October 4, 2013 x-ray positive based on

[6] 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). 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 preponderance of the positive readings by the dually qualified radiologists. Decision and Order at 28.

Employer also argues that in light of the progressive and irreversible nature of pneumoconiosis, the administrative law judge failed to explain why the October 4, 2013 x-ray is the most probative in comparison to the more recent x-rays. Employer's Brief at 7. Employer's argument lacks merit. The administrative law judge found the more recent x-rays in equipoise – they do not support a finding for or against clinical pneumoconiosis – and therefore do not aid employer in satisfying its burden of proof.[7] Because this ruling is supported by substantial evidence, we affirm the administrative law judge's finding employer did not disprove clinical pneumoconiosis based on the x-ray evidence. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 148-49 (1987); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004) (en banc); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1983).

The administrative law judge next weighed the medical opinions.[8] Dr. Habre diagnosed clinical pneumoconiosis, while Drs. Fino and Sargent did not. Director's Exhibits 27, 35, 38, 40; Employer's Exhibit 1. Contrary to employer's contention, the administrative law judge permissibly rejected the opinions of Drs. Fino and Sargent because they relied on negative x-ray readings in excluding a diagnosis of clinical pneumoconiosis, contrary to her determination that each x-ray is either positive or in equipoise and, when weighed as a whole, are "preponderantly positive for clinical pneumoconiosis."[9] Decision and Order at 33; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

The administrative law judge also considered Drs. DePonte's and Adcock's readings of the December 6, 2017 CT scan. Decision and Order at 29-30; Claimant's

[7] We affirm as unchallenged the administrative law judge's finding that the January 9, 2013, January 21, 2014, April 23, 2014, and March 28, 2018 x-rays are in equipoise. *See Skrack*, 6 BLR at 1-711; Decision and Order at 28-29.

[8] The administrative law judge accurately found that the record contains no biopsy evidence. Decision and Order at 25 n.21.

[9] The administrative law judge noted Dr. Fino concluded claimant did not have clinical pneumoconiosis based primarily on Dr. Seaman's negative reading of the April 23, 2014 x-ray. Director's Exhibit 27. Dr. Sargent relied on Dr. Adcock's negative reading of the March 28, 2018 x-ray. Employer's Exhibit 1.

Exhibit 5; Employer's Exhibit 20. Dr. DePonte noted "moderate diffuse emphysema" and identified "very fine interstitial" abnormalities in all lung zones "consistent with coal workers' pneumoconiosis." Claimant's Exhibit 5. Dr. Adcock identified a subpleural nodule (approximately 5 x 8 mm in size) in the right upper lobe, scattered "tiny calcified nodules" in the right upper lobe and right lower lobe, emphysematous changes, "old granulomatous disease" and "mild basilar emphysema." Employer's Exhibit 20. He found "no evidence of coal worker's pneumoconiosis." *Id*.

The administrative law judge determined that because both physicians are dually qualified as B readers and Board-certified radiologists, their credentials "equalize[] the probative value of their opinions." Decision and Order at 30. She found the CT scan evidence does not support a finding for or against the presence of clinical pneumoconiosis. *Id.*

Employer asserts the administrative law judge erred because she did not explain why Dr. DePonte's "failure to account for the impact of the granulomatous disease on her interpretation does not render it unreliable and unpersuasive." Employer's Brief at 9. Employer also argues the administrative law judge "should have attempted to reconcile these two contrary interpretations by analyzing their findings in the context of the overall medical records and [claimant's] medical history." *Id*. Employer does not identify, however, the specific medical records that undermine Dr. DePonte's positive reading of the CT scan.[10] *See Cox*, 791 F.2d at 446; *Sarf*, 10 BLR at 1-120-21. We therefore affirm the administrative law judge's permissible finding that the CT scan evidence is inconclusive for clinical pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-31 (4th Cir. 1997) (It is within the administrative law judge's discretion as fact-finder to weigh the credibility of the experts, and to determine the persuasiveness of their opinions.).

We consider employer's arguments on clinical pneumoconiosis to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer did not disprove clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); *see Compton*, 211 F.3d at 207-

[10] The administrative law judge found the treatment records neither establish nor refute that claimant has clinical pneumoconiosis. Decision and Order at 31-33. Employer has not identified any specific error by the administrative law judge in her consideration of the treatment records. *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

208. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that claimant did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge next considered whether employer established that "no part of [claimant'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). She rationally discounted the opinions of Drs. Fino and Sargent that claimant's disability is not due to pneumoconiosis because they did not diagnose clinical pneumoconiosis, contrary to her finding that employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 25. Therefore, we affirm the administrative law judge's finding employer did not establish no part of claimant's respiratory disability was due to clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

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

MELISSA LIN JONES
Administrative Appeals Judge