U.S. Department of Labor

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

BRB No. 20-0230 BLA

BENJAMIN W. THOMPSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
REDDINGER COAL COMPANY, INCORPORATED	)	
	)	
	)	
and	)	
	)	DATE ISSUED: 03/31/2021
ROCKWOOD CASUALTY INSURANCE COMPANY	)	
	)	
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick and Long), Ebensburg, Pennsylvania, for Claimant.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

ROLFE, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge Drew A. Swank's Decision and Order Awarding Benefits (2019-BLA-05743) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2018) (Act). This case involves Claimant's first claim for benefits, filed July 31, 2017.

The administrative law judge found Claimant established 19.63 years of qualifying coal mine employment and a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). He 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). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. It further argues the administrative law judge erred in finding Claimant established at least fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption and in finding Employer did not rebut it.[2] 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 administrative law judge's Decision and Order 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, 362 (1965).

Constitutionality of 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), Employer contends the Affordable Care Act

[1] Section 411(c)(4) 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. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] Claimant's coal mine employment occurred in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

(ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 13. Employer 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 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 Employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case.

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

To invoke the Section 411(c)(4) presumption, Claimant must establish at least fifteen years of coal mine employment either in "underground coal mines" or in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if . . . the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

Employer stipulated to nineteen years of coal mine employment at the hearing. Hearing Transcript at 5; *see also* Employer's Closing Memorandum at 2. While the administrative law judge found slightly more coal mine employment established, 19.63 years, Employer does not challenge that finding. We therefore affirm it as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).[4]

On his CM-911 Coal Mine Employment History form, Claimant indicated he was exposed to dust, gases, and fumes with each of the surface coal mine operators who employed him. Director's Exhibit 3 at 1-2. At the hearing, Claimant's counsel asked

[4] Notably, although not expressly stipulating to the dust conditions of Claimant's coal mine employment before the administrative law judge, Employer conceded in its post-hearing brief that the fifteen-year presumption applied. Responsible Operator's Closing Memorandum at 9. We need not decide whether Employer's unambiguous position below precludes it from taking the opposite position on appeal, however, because the administrative law judge's finding on substantial similarity clearly satisfies the Administrative Procedure Act under these circumstances. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Claimant to describe his work duties with each employer that he listed on his CM-911 and whether he was exposed to coal mine dust when performing that work. Claimant testified he worked in open pit mines for the entirety of his coal mine employment, primarily as a bulldozer operator, and described being exposed to coal mine dust in every job he held with five of the six different employers he listed.[5] Hearing Transcript at 9-15.

According to Claimant, he stripped the overburden from the coal, backfilled excavated areas, cleaned coal, and built and maintained roads at the mine sites. He testified that each of his jobs was dusty.[6] *Id.* Citing this testimony, the administrative law judge found "Claimant's aboveground mining conditions were equivalent to underground mining conditions . . . ." Decision and Order at 7 (citing Hearing Transcript at 9-15). He therefore concluded Claimant had more than fifteen years of qualifying coal mine employment. *Id.*

Employer argues the administrative law judge did not adequately discuss the evidence or provide sufficient rationale for his finding. It therefore contends his decision does not comply with the explanatory requirements of the Administrative Procedure Act (APA). 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Employer's Brief at 4-6. We disagree.

The APA provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). If a reviewing court can discern what the administrative law judge did and why he or she did it, the duty of explanation under the APA is satisfied. *See Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 354 (3d Cir. 1997); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013). We can.

The administrative law judge cited Claimant's testimony in support of his finding that Claimant established his surface coal mine employment was substantially similar to

[5] Claimant was not asked about the dust conditions he encountered during his six months working at R.D. Baughman Coal Company's open pit mine. Hearing Transcript at 12.

[6] For example, he testified he was around "lots of" coal dust with his first employer, Mauersberg Coal Company. Hearing Transcript at 10. Describing his later work with C & K Coal Company, where he was employed twice, Claimant explained the conditions were "[r]eal dusty" because the bulldozer he ran had an open cab and the mine overall was a dusty place. *Id.* at 11, 13. At Colt Coal Company, he described "dust and stuff just blow[ing] right back in on" him as he operated a bulldozer. *Id.* at 14. He further indicated that during his approximately four years with Reddinger Coal Company, he operated a bulldozer with a closed cab but the dust still got inside. *Id.* at 14-15.

underground coal mine employment. Decision and Order at 7. An administrative law judge is granted broad discretion in evaluating the credibility of 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), and a miner's unrefuted testimony of his exposure to coal dust at a surface mine is sufficient to support a finding of "substantial similarity" to conditions in an underground mine.[7] *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479-80 (7th Cir. 2001). Employer points to no evidence contradicting Claimant's testimony and provides no argument that it is not credible.[8] Because the administrative law judge cited uncontradicted testimony legally sufficient to establish Claimant was regularly exposed to coal mine dust while working at surface mines -- an issue Employer expressly conceded below -- we reject its contention that the administrative law judge's decision violates the APA.[9] *See Witmer*, 111 F.3d at 354; *Owens*, 724 F.3d at 557.

Because the administrative law judge's finding is supported by substantial evidence, we affirm the administrative law judge's finding that Claimant has at least fifteen years of

[7] While Claimant did not address the dust conditions for the six months he was employed at R.D. Baughman Coal Company, Hearing Transcript at 12, excluding this period of time would not decrease the total amount of Claimant's qualifying coal mine employment to less than fifteen years.

[8] Moreover, the record does not reveal any such evidence. To the contrary, Claimant stated on his coal mine employment history form that he was exposed to dust in his surface coal mine employment. Director's Exhibit 3. Dr. Celko included in his medical report Claimant's description of his coal mine dust exposure in each surface mining job he held. Director's Exhibit 13 at 2-5. For each job, Claimant rated his dust exposure on a ten-point scale, with ten representing the dustiest conditions. *Id*. He rated his dust exposure at eight for one employer, and as nine for all the rest. *Id*. Dr. Saludes also described Claimant's coal mine dust exposure in his medical report, noting Claimant was exposed to "heavy dust" due to running open-cab bulldozers eight hours a day. Claimant's Exhibit 1 at 2. Dr. Basheda noted Claimant's history of working as a dozer operator in open and closed cabs, and he reviewed Dr. Celko's report. Employer's Exhibit 1 at 1. Dr. Basheda noted Claimant's 19.63 years of surface "exposure places [Claimant] at risk for dust[-]induced pulmonary disease, if he was a susceptible coal miner." *Id*. at 15.

[9] Notably, in addition to its failure to identify any error in the administrative law judge's finding, Employer has not acknowledged its prior concession or attempted to explain its change of position on appeal. Nor has it (or our dissenting colleague) attempted to explain why citing Claimant's unrebutted testimony is insufficient to establish the dust conditions of his coal mine employment under the APA where Employer conceded the presumption's application.

qualifying coal mining employment. Decision and Order at 7; 20 C.F.R. §718.305(b)(2). We therefore further affirm the administrative law judge's finding that Claimant invoked the Section 411(c)(4) presumption. Decision and Order at 7.

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 legal[10] nor clinical pneumoconiosis,[11] or that "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 establish rebuttal by either method.[12]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer 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 Dr. Basheda's opinion that Claimant does not have legal pneumoconiosis but has severe obstructive lung disease due to smoking with

[10] "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).

[11] "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).

[12] The administrative law judge found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 14.

an asthmatic component. Employer's Exhibit 1 at 16-19; Employer's Exhibit 3 at 13-14. Neither of the other expert opinions supported rebuttal.[13]

The administrative law judge found Dr. Basheda's opinion expressed views at odds with the preamble to the 2001 revised regulations and conflicted with the recognition that pneumoconiosis can be a progressive disease. Decision and Order at 14. He further concluded that "[a]s the Act does not require that coal mine dust exposure be the sole cause of the [M]iner's respiratory impairment, for the reasons given in [the later discussion of the cause of Claimant's total disability, I find] that the evidence is insufficient to establish that the [M]iner's respiratory impairment is entirely unrelated to coal mine dust exposure." *Id.* at 15. In his discussion of the cause of Claimant's total disability, the administrative law judge found that although "Doctor Basheda . . . goes to great lengths to demonstrate why he believes that Claimant's pulmonary impairment is caused by his smoking," he did not "convincingly explain why Claimant's coal mine dust exposure could not be contributing in some part to his tobacco induced pulmonary impairment." Decision and Order at 25. Additionally, he found Dr. Basheda cited "two generic references in his report," but did not "support his assertions with a specific reference to a medical study or literature." *Id*. The administrative law judge therefore found Dr. Basheda's opinion not well-reasoned or persuasive.

Employer argues substantial evidence does not support the administrative law judge's findings that Dr. Basheda's opinion conflicts with the principle that pneumoconiosis may be progressive and with the medical science discussed in the preamble. Employer's Brief at 7-9. We need not address these arguments. The administrative law judge permissibly found Dr. Basheda's opinion unpersuasive because he did not adequately explain why Claimant's coal mine dust exposure did not also contribute to, or aggravate, his chronic obstructive pulmonary disease along with his smoking and asthma. *See* 20 C.F.R. §718.201(a)(2), (b); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 25. Further, the administrative law judge permissibly discounted Dr. Basheda's opinion because he did not adequately support his reasoning with any citation to medical literature. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz*, 788 F.2d at 163. Employer does not specifically challenge either of these credibility determinations. We therefore affirm the administrative law judge's determination that Employer did not rebut legal pneumoconiosis.[14] 20 C.F.R.

[13] Drs. Celko and Saludes diagnosed legal pneumoconiosis. Director's Exhibit 13; Claimant's Exhibit 1.

[14] We note the administrative law judge misstated the legal pneumoconiosis rebuttal standard, finding the evidence "insufficient to establish that the [M]iner's respiratory impairment is *entirely unrelated to* coal mine dust exposure." Decision and Order at 15

§718.305(d)(1)(ii). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge next addressed whether Employer established rebuttal of disability causation. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found Dr. Basheda's opinion regarding disability causation unpersuasive for the same reasons he rejected Dr. Basheda's opinion regarding legal pneumoconiosis. Decision and Order at 25.

Employer argues the administrative law judge erred in discounting Dr. Basheda's opinion regarding disability causation given the administrative law judge's alleged errors in his analysis of Dr. Basheda's opinion regarding legal pneumoconiosis. Employer's Brief at 9-12. Contrary to employer's assertion, the administrative law judge did not err in discounting Dr. Basheda's opinion that Claimant did not suffer from legal pneumoconiosis, as addressed above. The administrative law judge thus rationally found the same reasons also undermined his opinion it did not cause Claimant's disabling respiratory impairment. *See Soubik v. Director, OWCP,* 366 F.3d 226, 234 (3d Cir. 2004); *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013). Therefore, we affirm the administrative law judge's finding that Employer did not establish that no part of Claimant's respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 25.

(emphasis added). In considering rebuttal of total disability causation, he also stated Employer "must rule out the [M]iner's *coal mine employment* as a contributing cause of the totally disabling respiratory or pulmonary impairment," *Id*. at 23, *quoting* 77 Fed. Reg. 19,456, 19,463 (Mar. 30, 2012) (emphasis added), but the correct standard is whether Employer disproved disability causation by showing that no part of Claimant's respiratory or pulmonary total disability was caused by *pneumoconiosi*s. *See* 20 C.F.R. §718.305(d)(1)(ii) (emphasis added). But Employer has not raised these issues. Moreover, any error is harmless, as the administrative law judge ultimately did not reject Dr. Basheda's opinion for failing to satisfy a particular rebuttal standard but rather concluded it did not establish rebuttal because it was not sufficiently reasoned or persuasive. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

I concur.

DANIEL T. GRESH
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring:

Although I disagree with my colleagues that the Administrative Law Judge's conclusory reference to Claimant's testimony satisfies the requirements of the Administrative Procedure Act for purposes of establishing Claimant's entitlement to the Section 411(c)(4) presumption, I concur in the decision in all other respects. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); Decision and Order at 7. Consequently, I concur in affirming the administrative law judge's Decision and Order Awarding Benefits.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge