U.S. Department of Labor

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

BRB No. 20-0272 BLA

DANNY R. FLETCHER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FRASURE CREEK MINING, LLC d/b/a TRINITY COAL MARKETING	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 05/27/2021
	)	
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 Larry A. Temin, Administrative Law Judge, United States Department of Labor.

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

Cynthia Liao (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: BUZZARD, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Larry A. Temin's Decision and Order Awarding Benefits (2018-BLA-06194) 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 a miner's claim filed on October 25, 2016.

The administrative law judge credited Claimant with 15.81 years of surface coal mine employment in conditions substantially similar to those in an underground mine and found he has a totally disabling respiratory or pulmonary 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 asserts the administrative law judge erred in finding Claimant established fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption and that it failed to rebut the presumption. Employer also contends the administrative law judge erred in finding Claimant is entitled to augmented benefits for his spouse.[2] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response

[1] 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.

[2] Employer also generally challenges the administrative law judge's finding that Claimant established total disability. Employer's Brief at 9. The administrative law judge correctly found, however, that Employer stipulated to total disability at the hearing. Decision and Order at 16; Hearing Tr. at 11. Employer is bound by its stipulation. *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013); *Richardson v. Director, OWCP*, 94 F.3d 164, 167 (4th Cir. 1996). Moreover, Employer has not adequately briefed this issue as it summarily states the administrative law judge "erred when he concluded that the Claimant [is] totally disabled." Employer's Brief at 9; *see* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Thus we affirm the administrative law judge's finding Claimant is totally disabled. 20 C.F.R. §718.204(b)(2); Decision and Order at 16.

asserting any error the administrative law judge made in applying the legal standard for rebutting legal pneumoconiosis is harmless.

The 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 (1965).

Length of Qualifying Coal Mine Employment

Employer argues the administrative law judge erred in calculating the length of Claimant's coal mine employment. Employer's Brief at 5-6. We disagree.

In order to invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in "underground coal mines, or in coal mines other than underground mines in conditions substantially similar to those in underground mines, or in any combination thereof[.]" 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of establishing his length of coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold the administrative law judge's determination if it is based on a reasonable method of calculation and is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

The administrative law judge considered Claimant's employment history form, Social Security Administration (SSA) earnings records, deposition transcript, and hearing testimony. Decision and Order at 5-7; Director's Exhibits 3, 7, 33. He found this evidence established 15.81 years of coal mine employment from 1990 to 2011. *Id.*

Employer argues the administrative law judge's finding does not satisfy the Administrative Procedure Act (APA) because he did not specify how long Claimant worked for individual coal mine operators.[4] Employer's Brief at 5-6. Contrary to

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 12, 14.

[4] The Administrative Procedure Act 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).

Employer's argument, the administrative law judge specifically credited Claimant with 6.29 years of coal mine employment between 1990 and 1999 with Sid Williams Drilling Company/Williams Construction (Sid Williams), 3.63 years between 2000 and 2003 with L. King Construction, and 5.89 years between 2006 and 2011 with Frasure Creek Mining. Decision and Order at 5-7. Thus we reject Employer's argument that he did not explain his findings.[5] *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (if a reviewing court can discern what the administrative law judge did and why he did it, the duty of explanation under the APA is satisfied); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999).

Employer next argues the administrative law judge erred in calculating Claimant's employment for the years 1990 to 1999 with Sid Williams. Employer's Brief at 6. Its arguments have no merit.

Claimant testified that for the years 1990 to 1999, he was employed by Sid Williams as a truck driver, performing various duties at coal mines and gas extraction sites that had contracted with his employer for that work.[6] Hearing Tr. at 23-24; Director's Exhibit 33 at 15. He indicated eighty-percent of his employment with Sid Williams involved coal mining and twenty-percent involved gas extraction. Director's Exhibit 33 at 18-21. Contrary to Employer's argument, the administrative law judge permissibly credited eighty-percent of Claimant's work with Sid Williams as coal mine employment based on this uncontradicted testimony. *Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 299-300 (6th Cir. 2018); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (the administrative law judge is granted broad discretion in evaluating the credibility of the evidence, including witness testimony); Decision and Order at 5-6. As Employer raises no

[5] For the same reason, we reject Employer's assertion that it is particularly unclear "which companies were credited" during years Claimant worked for multiple employers. Moreover, Employer fails to identify those years or explain how earning income from more than one source undermines the administrative law judge's findings.

[6] In support of its argument, Employer highlights Claimant's testimony that he began working for Sid Williams in 1989 exclusively in gas extraction. Employer's Brief at 6. The administrative law judge, however, did not credit him with any coal mine employment that year. Decision and Order at 5; Director's Exhibit 33 at 21. Nor does that statement conflict with Claimant's testimony that during the remaining years eighty percent of his employment with Sid Williams involved coal mining.

other arguments with respect to these years, we affirm the administrative law judge's finding that Claimant established 6.92 years[7] of coal mine employment from 1990 to 1999.

Employer next argues the administrative law judge did not explain why he "singled out" 2001 as being a year Claimant worked for a full calendar year with L. King Construction. Employer's Brief at 5. Employer fails to acknowledge, however, that the administrative law judge based his finding on the fact that Claimant had no other employers in 2001 and earned "substantial" income exceeding 125 days of employment from the company that year. *See Shepherd*, 915 F.3d at 401-02; *Martin*, 400 F.3d at 305; *Muncy*, 25 BLR at 1-27; Decision and Order at 5. Those findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

As Employer raises no other arguments, we affirm the administrative law judge's finding that Claimant established 15.81 years of coal mine employment.[8] Decision and Order at 7.

We also reject Employer's argument the administrative law judge erred in finding Claimant's coal mine employment was substantially similar to underground coal mine employment. Employer's Brief at 7. It argues Claimant's testimony that he was exposed to coal dust in all of his jobs is insufficient because "simply being exposed does not establish regularity." But Employer ignores the totality of Claimant's testimony.

Claimant testified that he was exposed to coal mine dust every day on all of his coal mine jobs. Hearing Tr. at 35-36. He stated that while he worked for Employer, he was a "greaser/oiler" on a strip mine which required him to go everywhere on site, including down into the coal pits where it was "real dusty," and that it looked like he had been in a

[7] The administrative law judge credited eighty percent of Claimant's wages as being from coal mining employment and applied the formula at 20 C.F.R. §725.101(a)(32)(iii) to calculate the number of days he worked. He then credited Claimant with a year or fraction of a year based on the number of days worked as compared to 125. *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401-06 (6th Cir. 2019); Decision and Order on at 5-7.

[8] To the extent Employer intends to argue that the administrative law judge erred in crediting Claimant with coal mine employment when he was self-employed hauling coal to the tipple in 2002, that argument is rejected. Employer states, "[I]t appears and the Employer assumes, although such is not directly explained, as though the ALJ has credited the Claimant with credit for his self-employment in 2002 as being coal mines employment. However, the was crediting with coal mines employment." Employer's Brief at 5-6 (grammatical errors and words missing in original). This argument does not coherently identify any error.

coal mine when he came out. *Id.* at 14-17. He further stated that his other jobs were driving a coal truck, which also required him to go down into the coal pits to access the coal loaders, and that it was so dusty "[y]ou couldn't even see down there." *Id.* at 35. He indicated that when he was not in the coal pits, he was exposed to "[a] lot of dirt and rock dust, you know, off the roads." *Id.* at 36.

The administrative law judge found there is "no indication in the record that [Claimant's] testimony was inaccurate or erroneous." Decision and Order at 16. Thus the administrative law judge permissibly credited Claimant's uncontradicted testimony in determining he was regularly exposed to coal mine dust and his surface coal mine employment was substantially similar to underground coal mine employment. *Duncan*, 889 F.3d at 304; *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664 (6th Cir. 2015) (holding "uncontested lay testimony" regarding dust conditions "easily supports a finding" of regular dust exposure); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90 (6th Cir. 2014). Because it is supported by substantial evidence, we affirm his findings that Claimant established over fifteen years of qualifying coal mine employment and invoked the Section 411(c)(4) presumption. *See Shepherd*, 915 F.3d at 405-06; *Duncan*, 889 F.3d at 304; *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 Employer to establish he has neither legal nor clinical pneumoconiosis,[9] 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.[10]

[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). 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).

[10] The administrative law judge found Employer rebutted the presumption of clinical pneumoconiosis. Decision and Order at 18-19.

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). The United States Court of Appeals for the Sixth Circuit holds this standard requires Employer to show that the miner's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id*. at 407, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

The administrative law judge considered the medical opinions of Drs. Rosenberg and Dahhan. Decision and Order at 21-23. Dr. Rosenberg opined Claimant does not have legal pneumoconiosis, but has smoking-related chronic obstructive pulmonary disease (COPD) with an asthmatic component. Director's Exhibit 30; Employer's Exhibits 3-5. Dr. Dahhan opined Claimant does not have legal pneumoconiosis, but has a severe, partially reversible, obstructive ventilatory impairment caused by smoking. Director's Exhibit 28; Employer's Exhibits 2, 6, 7. The administrative law judge found their opinions unpersuasive because they are not well-reasoned, conclusory, "based on positions contrary to the findings of the Board and inconsistent with the preamble [to the 2001 revised] regulations." Decision and Order at 23.

Employer argues the administrative law judge applied an incorrect legal standard because he required Drs. Rosenberg and Dahhan to "rule out" coal mine dust exposure as a cause of Claimant's respiratory impairment. Employer's Brief at 7-8. We disagree. The administrative law judge correctly stated Employer has the burden of establishing that Claimant does not have legal pneumoconiosis, which he stated is any "chronic lung disease or impairment significantly related to, or substantially aggravated by, dust exposure from coal mine employment." Decision and Order at 17, 19-20; *see* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A). Moreover, the administrative law judge did not reject the opinions of Drs. Rosenberg and Dahhan because they were insufficient to meet a "rule out" standard on the existence of legal pneumoconiosis. Rather, he found their opinions not credible because he was not persuaded by the rationale each provided for why Claimant does not have legal pneumoconiosis. Decision and Order at 21-23; Director's Exhibits 28, 30; Employer's Exhibits 2-7. As Employer does not allege specific error in the administrative law judge's credibility determinations, we affirm them.[11] *See Cent. Ohio*

[11] Because we affirm the administrative law judge's finding that the opinions of Drs. Rosenberg and Dahhan are not credible, we need not address Employer's argument that he erred in failing to consider their qualifications. *See Kozele v. Rochester & Pittsburgh Coal*

Coal Co. v. Director, OWCP [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801 (6th Cir. 2012); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255; *Skrack*, 6 BLR at 1-711.

Because we affirm the administrative law judge's discrediting of the opinions of Drs. Rosenberg and Dahhan, we affirm his finding that Employer failed to disprove Claimant has legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Young*, 947 F.3d at 405; Decision and Order at 28. Thus we affirm his finding that Employer did not rebut the Section 411(c)(4) presumption by proving Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether Employer rebutted the Section 411(c)(4) presumption by establishing that "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). He permissibly discredited the opinions of Drs. Rosenberg and Dahhan because neither physician diagnosed legal pneumoconiosis, contrary to his finding that Employer did not disprove that Claimant has the disease. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 24. We therefore affirm the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii).

Augmented Benefits

We also reject Employer's contention that the administrative law judge erred in awarding augmented benefits on behalf of Claimant's spouse, Teresa Patrick. Employer's Brief at 9. A miner's benefits may be augmented on behalf of a spouse if the relationship and dependency standards are met. *See* 20 C.F.R. §§725.204, 725.205. The administrative law judge correctly found that Claimant and Ms. Patrick are married based on their marriage certificate and Claimant's testimony that they are not divorced. Decision and Order at 7; Hearing Tr. at 21-22; Director's Exhibit 13. He further accurately found that because Claimant and his wife have been married since 1991, she meets the dependency requirement even though she does not live with Claimant. 20 C.F.R. §725.205(e) (for the purposes of augmenting benefits, an individual who is the miner's spouse will be

---

Co., 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 8-9. As the opinions of Drs. Rosenberg and Dahhan are the only opinions supportive of Employer's burden of proof, we also need not address its argument that he erred in crediting Dr. Ajjarapu's opinion that Claimant has legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 8.

determined to be dependent upon the miner if the individual was married to the miner for a period of not less than one year). Because Ms. Patrick satisfies the relationship and dependency requirements, we affirm the administrative law judge's finding that Claimant is entitled to augmented benefits on behalf of his spouse. Decision and Order at 7.

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