U.S. Department of Labor

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

BRB No. 20-0069 BLA

VICTOR J. JEWELL	)	
	)	
v.	)	
	)	
ARCH ON THE NORTH FORK, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 11/13/2020
ARCH COAL, INCORPORATED	)	
	)	
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.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland for Employer.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, 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-05517) rendered on a claim

filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on November 18, 2016.[1]

The administrative law judge credited Claimant with 15.52 years of surface coal mine employment in conditions substantially similar to those in an underground coal mine and found he is totally disabled. 20 C.F.R. §718.204(b)(2). Thus, he determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act[2] and established a change in an applicable condition of entitlement.[3] 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 asserts 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.[4] It further argues he erred in finding the presumption

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[1] Claimant filed two prior claims, each of which was denied. Director's Exhibits 1, 2. The district director denied Claimant's last claim for failure to establish any element of entitlement. Director's Exhibit 2.

[2] Under Section 411(c)(4), Claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes 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) (2012); 20 C.F.R. §718.305.

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Because Claimant failed to establish any element of entitlement in his prior claim, he had to submit new evidence establishing at least one element to obtain a review of his current subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 2.

[4] By separate order the Benefits Review Board rejected Employer's argument regarding the constitutionality of the Section 411(c)(4) presumption and its request to hold this case in abeyance. *Jewell v. Arch Coal, Inc.*, BRB No. 20-0069 BLA (Jan, 31, 2020) (unpub. Order).

unrebutted. Neither Claimant nor the Director, Office of Workers' Compensation Programs, has 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.[5] 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).

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

Because Claimant established he is totally disabled,[6] he is entitled to the Section 411(c)(4) presumption if he had at least fifteen years of employment in underground coal mines or surface mines "in conditions substantially similar to those in an underground mine." 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b)(1)(ii). Employer challenges the administrative law judge's finding on the length of coal mine employment and his determination Claimant worked in substantially similar conditions.

Length of Coal Mine Employment

Claimant bears the burden to establish the number of years he worked in coal mine employment. *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 an administrative law judge's length of coal mine employment determination if based on a reasonable method and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988) (en banc).

The administrative law judge found Claimant worked for Employer from May 8, 1974 to March 12, 1989 and for approximately two weeks in September 1989 for a total of 15.52 years. Decision and Order at 6. Employer alleges the period of May 8, 1974 to March 12, 1989, "obviously is two months less than [fifteen] years" and "the extra

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[5] Because Claimant's last coal mine employment occurred in Kentucky the Board will apply the law 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).

[6] We affirm, as unchallenged, the administrative law judge's finding that Claimant established total disability and a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 725.309; Decision and Order at 15-16.

approximately two weeks of employment in September 1989 cannot add up to [fifteen] years under any reasonable calculation." Employer's Brief at 15. We disagree.

The administrative law judge noted that "although [Claimant] is now unable to remember the exact start and end dates of his employment," his Social Security Administration (SSA) earnings record and the evidence from his prior claim establishes that he worked for [Employer] from May 8, 1974 to September 19, 1989. Decision and Order at 6. He found that "[a]side from the Claimant's testimony regarding his car accident injuries in 1989, there is no other probative evidence to show that he was not continuously employed from his start date in 1974 to 1988." *Id.* The administrative law judge further found Claimant's SSA earnings records show substantial earnings from Employer from 1974 to 1988 that exceed the average annual earnings for 125 days of coal mine employment contained in Exhibit 610 of the *BLBA Procedure Manual*. *Id.*; *see* Director's Exhibit 8. He also found no evidence in the record to dispute Claimant "worked in or around the mines for at least 125 days each of those years . . . ." Decision and Order at 6.

Based on this evidence, the administrative law judge permissibly found Claimant was entitled to a full year of coal mine employment in 1974 because he worked at least 125 days in that year. *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402-405 (6th Cir. 2019).[7] He also permissibly credited Claimant with full years of coal mine employment in each of the years from 1975 through 1988 for a total of fourteen years.[8] *Id.* As it is supported by substantial evidence, we affirm the administrative law judge's finding that Claimant established fifteen years of coal mine employment from 1974 through 1988.[9] *See Muncy*, 25 BLR at 1-27; Decision and Order at 6.

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[7] In *Shepherd*, the Sixth Circuit held that a claimant need not establish a full calendar year employment relationship under the definition of "year" at 20 C.F.R. §725.101(a)(32), including when using the formula at paragraph (iii). *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402-405 (6th Cir. 2019). Rather, if the result of the formula "yields at least 125 working days, the miner can be credited with a year of coal mine employment, regardless of the actual duration of employment for the year." *Id.* at 402. If the results yield less than 125 days, "the miner still can be credited with a fractional portion of a year based on the ratio of the days worked to 125." *Id.*

[8] Employer does not dispute Claimant worked for a full calendar year in each of the years from 1975 through 1988, which total fourteen years of coal mine employment.

[9] Because Claimant established the requisite fifteen years of coal mine employment necessary to invoke the Section 411(c)(4) presumption, we need not address Employer's

Substantial Similarity

To invoke the Section 411(c)(4) presumption, Claimant must establish his fifteen years of surface coal mine employment took place "in conditions substantially similar to those in underground mines." 30 U.S.C. §921(c)(4) (2012); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). The conditions are considered "substantially similar" if the claimant demonstrates that [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) (Kethledge, J., concurring); *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).

As the administrative law judge accurately noted, Claimant testified that he last worked as an end loader operator and over the years performed various jobs working in the pits, on the coal roads, and at the tipple. Hearing Transcript at 22-23. Claimant stated that his work could get "pretty dusty" in the coal pit or when the water truck was not running on the roads. *Id*. at 26. He also described his work at the tipple as dusty. *Id*. at 26-27. He stated that even when he operated equipment with enclosed cabs, the doors would not seal and dust would get in. *Id*. at 27.

The administrative law judge found "no indication in the record that [Claimant's] testimony was inaccurate or erroneous." Decision and Order at 14. He also noted that Claimant indicated on his employment history form that he was exposed to dust, gases or fumes during his surface coal mine employment. Director's Exhibit 5. Thus, the administrative law judge found Claimant established regular exposure to coal mine dust and satisfied his burden to prove he worked in conditions substantially similar to those in an underground mine. Decision and Order at 14.

Employer asserts the administrative law judge's findings on substantial similarity do not satisfy the Administrative Procedure Act.[10] It argues the administrative law judge "erred by failing to explain why testimony that some of Claimant's work was only 'pretty dusty' established conditions comparable to employment in underground work."

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arguments pertaining to Claimant's employment in 1989. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[10] The Administrative Procedure Act (APA) provides 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 Brief at 10. It also argues the administrative law judge did not explain "how Claimant's work on equipment with an enclosed cab could constitute conditions comparable to the conditions in an underground mine" and "erred by failing to explain why he did not deduct time of exposure when Claimant was not working in the pits, or when he was working on coal roads when the water truck was running on the roads." *Id.*

Contrary to Employer's assertion, Claimant is not required to prove the dust conditions aboveground were identical to those underground, *see* 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013), nor does he "have to prove that [he] was around surface coal dust for a full eight hours on any given day for that day to count." *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 481 (7th Cir. 2001); *see Kennard*, 790 F.3d at 664-65. The administrative law judge permissibly found Claimant's unrefuted testimony was adequately detailed regarding his overall dust exposure in his surface coal mine employment. *See Kennard*, 790 F.3d at 664 (a miner's "uncontested lay testimony" regarding his dust conditions "easily supports a finding" of regular dust exposure); *Sterling*, 762 F.3d at 490. We also see no error in the administrative law judge's reliance on Claimant's employment history form as supportive of a finding Claimant was regularly exposed to coal mine dust. Director's Exhibit 5; Employer's Brief at 11-2.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Assessing the credibility of witness testimony is committed to the administrative law judge's discretion, and the Board will not disturb his findings unless they are inherently unreasonable. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Claimant established at least fifteen years of qualifying surface coal mine employment. We therefore affirm the administrative law judge's finding that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

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,[11] or that "no part

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[11] 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). This definition encompasses 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

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 did not establish rebuttal by either method.

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). The United States Court of Appeals for the Sixth Circuit holds that an employer may rebut legal pneumoconiosis by showing 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). The "in part" standard requires an employer to show that coal mine dust exposure "had at most only a de minimis effect on [the miner's] lung impairment." *Id*. at 407.

Employer relies on the opinions of Drs. Dahhan and Jarboe to establish Claimant's respiratory impairment is due entirely to smoking and that he does not have legal pneumoconiosis. The administrative law judge found their opinions inadequately reasoned. Employer contends that the administrative law judge substituted his opinion for those of the medical experts, selectively analyzed the evidence, and did not adequately explain his credibility findings.[12] Employer's Brief at 15-17, 21. We disagree.

Drs. Dahhan and Jarboe opined Claimant does not have legal pneumoconiosis based, in part, on studies indicating the average FEV1 loss on pulmonary function testing is far greater from cigarette smoking than from coal mine dust exposure.[13] The

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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] Employer also contends the administrative law judge's erroneous findings on substantial similarity of Claimant's surface coal mine employment carried over to his evaluation of Drs. Dahhan's and Jarboe's opinions on legal pneumoconiosis. Employer's Brief at 17-18. Because we have affirmed the administrative law judge's finding that Claimant established at least fifteen years of qualifying coal mine employment, we reject Employer's contention.

[13] Dr. Dahhan opined Claimant has chronic obstructive pulmonary disease related solely to smoking. Director's Exhibit 23. He opined Claimant has "a lengthy smoking habit that is sufficient in being injurious to the respiratory system in a susceptible host and

administrative law judge permissibly found their opinions unpersuasive because they "simply relied on the premise that the loss [in Claimant's FEV1] was more likely to be the result of smoking" and did not adequately explain why, in Claimant's particular circumstances, coal mine dust exposure did not also substantially contribute to his respiratory condition. Decision and Order at 20, *citing* Fed. Reg. 79,920, 79,941 (Dec. 20, 2000) (statistical averaging can hide the effect of coal mine dust exposure in individual miners); *see Young*, 947 F.3d at 408-09; *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985) (administrative law judge may reject medical opinions that rely on generalities and not specifics of a miner's case). The administrative law judge also permissibly found that neither Dr. Dahhan nor Dr. Jarboe adequately addressed the Department of Labor's position that the risks of smoking and coal mine dust exposure may be additive. *See* 65 Fed. Reg. at 79,941; *Young*, 947 F.3d at 403-07*; Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 20.

Employer's arguments on legal pneumoconiosis amount to a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). The administrative law judge acted within his discretion in finding Drs. Dahhan's and Jarboe's opinions inadequately reasoned to establish that coal mine dust exposure did not substantially contribute to Claimant's respiratory impairment.[14] *See* 20 C.F.R. §718.201(b); *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255. We therefore affirm the administrative law judge's finding that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A). Employer's failure

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causes a loss of up to 90cc per pack year" in comparison "with the loss in the FEVl estimated to be 5-9cc per year" from coal mine dust exposure shown in medical literature. *Id*. at 2-3. Dr. Jarboe diagnosed reactive airways disease and emphysema caused by smoking. Employer's Exhibit 2. He compared the decline in FEV1 values between both underground and surface coal miners who either smoked or did not smoke. *Id*. at 5. He opined the fact Claimant had a lengthy smoking history placed him at greater risk for reductions in the FEV1 compared to his level of dust exposure in surface coal mine employment. *Id*.

[14] Because the administrative law judge gave valid reasons for discrediting Drs. Dahhan's and Jarboe's opinions on legal pneumoconiosis, we need not address Employer's remaining contentions regarding the administrative law judge's additional rationales for rejecting their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

to disprove legal pneumoconiosis precludes a rebuttal finding Claimant does not have pneumoconiosis.[15] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge found Employer did not establish 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). He discredited the disability causation opinions of Drs. Dahhan and Jarboe because neither diagnosed legal pneumoconiosis, contrary to his finding Employer failed to disprove Claimant has the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 23. Employer raises no specific arguments on disability causation, other than to assert Claimant does not have legal pneumoconiosis. Because we have affirmed the administrative law judge's credibility findings on legal pneumoconiosis, we affirm his determination that Employer did not rebut the Section 411(c)(4) presumption by establishing no part of Claimant's respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 23. We therefore affirm the administrative law judge's determination Claimant is entitled to benefits. 30 U.S.C. §921(c)(4) (2018).

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[15] The administrative law judge also found Employer did not disprove clinical pneumoconiosis. Decision and Order at 19. Because we have affirmed the administrative law judge's findings on legal pneumoconiosis, we need not address Employer's arguments on clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge