U.S. Department of Labor

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

BRB No. 21-0061 BLA

JERRY THOMAS RATLIFF	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN COAL CORPORATION	)	
	)	DATE ISSUED: 11/23/2021
Employer-Petitioner	)	
	)	
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 Carrie Bland, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

James M. Kennedy and Lois A. Kitts (Baird & Baird, P.S.C.), Pikeville, Kentucky, for Employer.

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting 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 appeals Administrative Law Judge (ALJ) Carrie Bland's Decision and Order Awarding Benefits (2018-BLA-05006) 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 subsequent claim filed on January 25, 2017.[1]

The ALJ determined Claimant established at least 25.21 years of surface coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore 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)(2018). She 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 also argues the ALJ erred in finding Claimant worked as a miner for 25.21 years and did so in conditions substantially similar to those in an underground mine. Thus it asserts the ALJ erred in finding Claimant invoked the presumption.[3] It further contends she erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging rejection of Employer's constitutional challenge to the Section 411(c)(4) presumption and its argument that Claimant did not work as a miner.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 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).

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[1] This is Claimant's third claim. The district director denied his most recent prior claim, filed on September 4, 2002, because he did not establish pneumoconiosis. Director's Exhibit 2.

[2] 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); 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant established total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 20.

[4] 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*

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 (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 3-5. 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.* Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

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

Definition of a Miner

Employer next argues that Claimant's 25.21 years of employment do not constitute the work of a miner. Employer's Brief at 5-9. We disagree. A "miner" is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. §902(d). There is "a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner." 20 C.F.R. §725.202(a); *see also* 20 C.F.R. §725.101(a)(19). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this cases arises, has held duties that meet situs and function requirements constitute the work of a miner as defined in the Act. *See Navistar, Inc. v. Forester*, 767 F.3d 638, 641 (6th Cir. 2014); *Falcon Coal Co. v. Clemons*, 873 F.2d 916, 922 (6th Cir. 1989); *Director, OWCP v. Consol. Coal Co.* [*Petracca*], 884 F.2d 926, 929-30 (6th Cir. 1989). Under the situs requirement, the work must take place in or around a coal mine or coal preparation facility; under the function requirement, the work must be integral or necessary to the extraction or preparation of coal. *Id.*

Claimant worked for 25.21 years as a lab technician collecting coal samples from the mines and testing their chemical composition in the lab. Decision and Order at 4-7. The ALJ found this employment satisfies the situs-function test. *Id.* Employer does not challenge the ALJ's finding that Claimant's work satisfies the situs requirement. We therefore affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer contends the ALJ erred, however, in finding this work also satisfies the function prong because it asserts Claimant's job did not involve the extraction or

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Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 2, 5; Hearing Transcript at 14.

preparation of coal and is only ancillary to the coal mining process.[5] Employer's Brief at 5-9. We disagree.

The Board has held that a laboratory technician who collects coal samples for processing and analysis performs a function that is integral and necessary to the preparation of coal. *See Bower v. Amigo Smokeless Coal Co.*, 2 BLR 1-729, 1-736 (1979), *aff'd sub nom. Amigo Smokeless Coal Co. v. Director, OWCP* [*Bower*], 642 F.2d 68, 69-71 (4th Cir. 1981).[6] Further, in *Clemons*, the Sixth Circuit surveyed precedent construing the term miner and noted that coal laboratory technicians who collect coal samples for processing and analysis have been found to be miners because "collection work constitutes preparation and because chemical analysis is a necessary step in preparing coal for sale." *Clemons*, 873 F.2d at 922-23, *citing Bower*, 642 F.2d at 69-71. The court stated that the general difference between claimants who are found to be miners and those who are not is that the former "handle raw coal or . . . perform tasks necessary to keep the mine operational," while the latter (such as a claimant who delivered lunches to miners underground) perform tasks that are "merely convenient but not vital or essential to production and/or extraction." *Id*.

The ALJ found Claimant's uncontradicted testimony establishes that he retrieved samples of coal from preparation plants, mines, stockpiles, and the tipple, then crushed and pulverized those samples in the lab in order to determine the chemical composition of the coal and "make sure the customer got the quality of coal that they wanted." Decision and Order at 4-5; Hearing Testimony at 15-19, 42-45. She observed the coal Claimant tested

[5] While Employer challenges the ALJ's finding that Claimant worked as a "miner" under the Act, it does not challenge the ALJ's finding that Claimant established 25.21 years of employment as a coal lab technician. Thus, we affirm this finding. *See Skrack*, 6 BLR at 1-711; Decision and Order at 12.

[6] In affirming the Board's decision in *Bower*, the United States Court of Appeals for the Fourth Circuit stated there is a factual and legal basis for concluding that testing and preparing samples of coal came within the statutory definition of coal preparation because "some evidence tended to show that knowledge of the chemical composition and energy content of the coal was a necessary step in [the employer's] preparation of the coal for sale." *Amigo Smokeless Coal Co. v. Director, OWCP* [*Bower*], 642 F.2d 68, 70-71 (4th Cir. 1981). The court also affirmed the Board's holding that "work in collecting the samples at the mine sites and tipple and transporting them to the laboratory was also work in preparing coal," on the basis that "[i]f testing the coal in the laboratory is also part of the preparation of the coal, then transporting the coal from the excavation site to the laboratory is . . . evidently work of preparing coal." *Id*., *citing Roberts v. Weinberger*, 527 F.2d 600 (4th Cir. 1975).

had not yet entered the stream of commerce, and thus he performed the important function of determining the chemical composition of the coal in order to determine the appropriate buyers. Decision and Order at 7; Hearing Testimony at 29-30, 37-38. She rationally found Claimant's work met the function prong because it is "necessary for [the operator] to know the chemical composition of the coal in order to fill its customers' orders with coal containing specified proportions of sulfur, ash, and BTU." Decision and Order at 7; *see Clemons*, 873 F.2d at 922-23; *Bower*, 2 BLR at 1-736. Consequently, we affirm the ALJ's finding that Claimant's 25.21 years of work as a coal lab technician qualifies as that of miner. 30 U.S.C. §902(d).

Qualifying Coal Mine Employment

Employer also argues the ALJ erred in determining Claimant worked in conditions substantially similar to those in an underground mine.[7] Employer's Brief at 6-7.

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines or surface coal mines in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4) (2018); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). The conditions in a surface mine are "substantially similar" to those underground if "the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich American Insurance Group v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90 (6th Cir. 2014).

The ALJ summarized Claimant's testimony with respect to his dust exposure:

> Claimant testified that he was exposed to coal dust on a daily basis because his job duties required him to visit coal sites as well as crush and break down coal samples on a regular basis. Claimant testified that he would spend about [thirty percent] of the time driving to the prep plant or mines and collecting coal samples, and [sixty to seventy percent] crushing, pulverizing, and running analysis on samples. When pulverizing samples, Claimant would be exposed to dust [thirty to forty percent] of the time in a daily shift.

[7] To the extent Employer argues Claimant did not establish qualifying coal mine employment because he was not exposed to coal mine dust one-hundred percent of his working days, we find no merit in Employer's argument. Employer's Brief at 7. Claimant is not required to establish 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).

Decision and Order at 8, *citing* Hearing Transcript at 28, 48-49. Contrary to Employer's argument, the ALJ rationally found Claimant's testimony establishes he was regularly exposed to coal mine dust.[8] *Duncan*, 889 F.3d at 304; *Kennard,* 790 F.3d at 663; *Sterling*, 762 F.3d at 489-90; Decision and Order at 8.

As Claimant established more than fifteen years of qualifying coal mine employment, we affirm the ALJ's finding that he invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b).

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); *Minich v. Keystone Coal Mining*

[8] Employer's argument that Claimant's exposure was primarily to "coal dust" rather than "coal mine dust," and is thus insufficient to establish regular coal mine dust exposure, is wholly without merit. Employer's Brief at 6-7. As the Director argues, "'[c]oal mine dust' means any dust generated in the course of coal mining operations . . ."). Director's Brief at 2, *citing* 65 Fed. Reg. 79,920, 79,958 (Dec. 20, 2000). This term obviously includes dust from coal itself. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015) (rejecting distinction between coal dust and rock dust for invoking the Section 411(c)(4) presumption); *Pershina v. Consolidation Coal Co.*, 14 BLR 1-55 (1990) (en banc); *George v. Williamson Shaft Contracting Co*., 8 BLR 1-91 n.1, 1-93 (1985); *Conley v. Roberts and Schaefer* Co., 7 BLR 1-309, 1-311 (1984).

[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 that is 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).

Corp., 25 BLR 1-149, 1-150 (2015). The ALJ found Employer failed to establish rebuttal under either method.[10]

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*, 25 BLR at 1-155 n.8. The Sixth Circuit holds Employer can "disprove the existence of 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). "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 ALJ considered the opinions of Drs. Vuskovich and Tuteur. Dr. Vuskovich diagnosed an obstructive respiratory impairment due to asthma and unrelated to coal mine dust exposure. Employer's Exhibits 1, 5, 8. Dr. Tuteur diagnosed chronic obstructive pulmonary disease (COPD) due to cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibits 2. The ALJ found their opinions unpersuasive and thus insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 23.

Employer argues the ALJ erred in discrediting Dr. Vuskovich's opinion. Employer's Brief at 10-12. We disagree. Dr. Vuskovich opined that Claimant's obstructive respiratory impairment is unrelated to coal mine dust exposure because it is partially reversible after the administration of bronchodilators. Employer's Exhibit 1 at 14. He also opined that coal mine dust did not contribute to Claimant's impairment because he "was not an active coal miner and was likely not [exposed] to coal mine dusts." Employer's Exhibit 1 at 13.

Contrary to Employer's contentions, the ALJ permissibly found Dr. Vuskovich did not adequately explain why the irreversible portion of Claimant's obstructive impairment is not significantly related to, or substantially aggravated by, coal mine dust exposure. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 23. She further permissibly found his opinion not well-reasoned because he underestimated Claimant's exposure to coal mine dust. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989).

[10] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 19.

Dr. Tuteur opined that Claimant's COPD was caused by his smoking, not his coal mine dust exposure, because studies show there is a "very low incidence" of coal mine dust-induced COPD, and coal miners who smoke develop COPD at a significantly higher rate than non-smoking coal miners. Employer's Exhibit 2 at 5-8. The ALJ found Dr. Tuteur's opinion is not well-reasoned because it is based on generalities and does not explain why Claimant is not one of the supposedly few coal miners who develop COPD due coal mine dust exposure. Decision and Order at 23; *see Young*, 947 F.3d at 408-09; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 312-13 (4th Cir. 2012).

Employer identifies no error in this credibility finding. It generally asserts Dr. Tuteur "sufficiently explained how he completely excluded coal mine dust as a cause of the COPD and pulmonary impairment." Employer's Brief at 12-13. Employer's argument is a request to 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); Employer's Brief at 12-13.

Because the ALJ permissibly discredited the only opinions supportive of Employer's burden on rebuttal, we affirm her finding Employer did not disprove legal pneumoconiosis. 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).

The ALJ next considered whether Employer rebutted the presumption by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis."[11] Decision and Order at 23-24, *quoting Minich*, 25 BLR at 1-155 n.8; 20 C.F.R. §718.305(d)(1)(ii). She rationally discredited the opinions of Drs. Vuskovich and Tuteur because they did not diagnose legal pneumoconiosis, contrary to her finding that Employer failed to disprove the disease. *See Big Branch Res., 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 ALJ's finding Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii), and the award of benefits.

[11] We reject Employer's argument that "[t]he burden of proof on rebuttal was impermissibly extended to ruling out the possibility of disability causation." Employer's Brief at 13-14. The ALJ properly considered whether Employer established that no part of Claimant's total disability was caused by his legal pneumoconiosis. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 667 (6th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013).

Accordingly, the ALJ'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