U.S. Department of Labor

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

BRB No. 19-0506 BLA

ENA MORRIS (Executrix of the Estate of BUDDIE RAY MORRIS, II)	)	
Claimant-Respondent	)	
v.	)	
GREEN RIVER COAL COMPANY	)	DATE ISSUED: 10/21/2020
and	)	
SECURITY INSURANCE COMPANY OF HARTFORD	)	
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 Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for Claimant.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for Employer and its Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Jonathan C. Calianos's Decision and Order Awarding Benefits (2016-BLA-05489) rendered on a claim filed on February 7, 2014 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The administrative law judge credited the Miner with at least fifteen years of underground coal mine employment and found he had 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.[2] 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 administrative law judge's findings that Claimant established at least fifteen years of coal mine employment and therefore invoked the Section 411(c)(4) presumption.[3] It also asserts he 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, declined to file a substantive response.

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

[1] The Miner died on September 2, 2018, while his claim was pending. Decision and Order at 2. Claimant, the Miner's widow, is pursuing the claim on behalf of his estate. *Id*.

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he had 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.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding Claimant established total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13-33.

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).

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

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines, or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years the Miner 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 determination based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

In calculating the Miner's coal mine employment, the administrative law judge evaluated the Miner's July 7, 2017 sworn affidavit, deposition and hearing testimony, and Social Security Administration (SSA) earnings records.[5] Decision and Order at 3-13.

In the July 7, 2017 affidavit, the Miner alleged approximately sixteen and one-half years of coal mine employment with six coal mine operators from 1968 to 2007. Administrative Law Judge Exhibit 14. He indicated that he worked for six months at

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 10; Director's Exhibits 3, 14.

[5] The Miner first testified in a deposition taken on August 13, 2014. Director's Exhibit 14. He then testified at a December 15, 2016 hearing. December 15, 2016 Hearing Tr. at 7-21, 38-46. The parties reconvened and held a telephonic hearing on June 13, 2017, for the purposes of admitting evidence into the record. During this hearing, the administrative law judge advised the parties that the Miner's prior deposition and hearing testimony was "less than clear" with respect to his coal mine employment history. June 13, 2017 Hearing Tr. at 13-14. He indicated he was reopening the record and scheduling another hearing for the limited purpose of obtaining clear testimony from the Miner on his coal mine employment. *Id*. at 13-20. Neither party objected. Subsequently the Miner completed the July 7, 2017 affidavit setting forth his employment, which the administrative law judge admitted into the record on August 18, 2017. The parties again held a telephonic hearing on August 29, 2017, and the Miner provided additional testimony on his employment. August 29, 2017 Hearing Tr. at 5-37.

Freeman United Coal Company (Freeman); three years and seven months for Island Creek Coal Company (Island Creek); one year and one month for Midwest Mining and Construction (Midwest Mining); three years and ten months for Kenellis Energies/Brushy Creek Mines (Brushy Creek Mines); six years and four months for Green River Coal Company (Green River); and one year and one month for American Coal Company (American Coal). *Id*. The administrative law judge determined that the Miner's affidavit reflects sixteen and one-half years of coal mine employment. August 29, 2017 Hearing Tr. at 35-37; Decision and Order at 13.

During the August 29, 2017 hearing, however, the administrative law judge acknowledged the Miner provided testimony that could reduce some periods of employment identified in his affidavit. August 29, 2017 Hearing Tr. at 35-37. The Miner specifically testified he earned $319.00 per month with Freeman. *Id*. at 8, 35-37. When this testimony was considered in conjunction with the total earnings of $599.80 with this operator reported in his SSA earnings records, the administrative law judge found the evidence may establish the Miner worked for only two months for Freeman rather than the six months he alleged in his affidavit.[6] August 29, 2017 Hearing Tr. at 35-37; Administrative Law Judge Exhibit 14; Director's Exhibit 7. Further, the Miner testified at the hearing that when he worked for Island Creek, he may have taken "at most" six months off to attend classes. August 29, 2017 Hearing Tr. at 11-14, 32-37. The Miner also testified his first month of work with Midwest Mining involved evaluating mine sites rather than mining coal. *Id*. at 20-23, 35-37. Finally, the Miner testified the mine site at Green River did not produce coal the first four months he worked there. *Id*. at 25-26, 35-37.

The administrative law judge found, however, that even if the Miner's coal mine employment with Freeman, Island Creek, Midwest Mining, and Green River were reduced based on this testimony, the total amount of time deducted would equal fifteen months. August 29, 2017 Hearing Tr. at 35-37. He therefore found the record still supports a finding of fifteen years and two months of coal mine employment, notwithstanding the Miner's testimony. *Id*. He advised the parties he was finding at least fifteen years of coal mine employment for purposes of the Section 411(c)(4) presumption unless the parties argued in their post-hearing briefs that this finding was erroneous. *Id*. at 37. In his Decision and Order, the administrative law judge adopted the finding he rendered at the August 29, 2017 hearing as neither party raised additional argument in post-hearing briefing. Decision and

[6] The Miner's SSA records show combined earnings of $599.80 in 1969 and 1970 with Freeman. Director's Exhibit 7. Notwithstanding the SSA records, the Miner disputed Employer's counsel's assertion that he worked for Freeman for only two months and maintained he worked for this operator for six months. August 29, 2017 Hearing Tr. at 8-10.

Order at 13. He further found the Miner's affidavit and hearing testimony were credible. *Id*. Thus he found Claimant established at least fifteen years of coal mine employment. *Id*.

Employer argues the administrative law judge erred in crediting the Miner's affidavit and hearing testimony as it asserts this evidence is "unclear and vague." Employer's Brief at 2-4. Employer also argues the evidence establishes less than fifteen years of coal mine employment. *Id*. Employer has waived these arguments.

As discussed above, the administrative law judge found at the August 29, 2017 hearing that the Miner's affidavit and hearing testimony would establish at least fifteen years of coal mine employment even accounting for reduced time reflected in the hearing testimony. August 29, 2017 Hearing Tr. at 35-37. He informed the parties if they disagreed with his finding, they could raise any additional arguments in their post-hearing briefs. *Id*.

In its post-hearing brief, Employer recognized the administrative law judge's finding of at least fifteen years of coal mine employment, but made no arguments that this finding was erroneous. It argued only that the Miner had a longer smoking history than he admitted, the evidence did not establish pneumoconiosis, and even if the Miner invoked the Section 411(c)(4) presumption, Employer rebutted it. Employer's Post-Hearing Brief at 2-9. Employer did not argue the Miner has no coal mine employment with Freeman and Midwest Mining and only one year with Island Creek as it now argues before the Board. Nor did it argue to the administrative law judge that the Miner's testimony regarding his employment is not credible. Thus it waived these arguments. *Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 479 (6th Cir. 2009); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-4-7 (1995); *Prater v. Director, OWCP*, 8 BLR 1-461, 1-462 (1986).

We thus affirm the administrative law judge's finding the Miner had greater than fifteen years of coal mine employment. Because it is unchallenged on appeal, we further affirm his finding that all of the Miner's employment occurred in underground coal mines. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13; August 29, 2017 Hearing Tr. at 6. We therefore affirm his determination that Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.305(b)(1).

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[7] or "no part

[7] "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

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.

Clinical Pneumoconiosis

Employer does not challenge the administrative law judge's finding it failed to rebut the presumed existence of clinical pneumoconiosis. Decision and Order at 35-40. We therefore affirm it. 20 C.F.R. §718.305(d)(1)(i)(B); *see Skrack*, 6 BLR at 1-711. Although Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis, we will address the issue of legal pneumoconiosis because it is relevant to the second method of rebuttal. 20 C.F.R. §718.305(d)(1)(i).

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did 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 Co*., 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting). The Sixth Circuit holds this standard requires Employer to "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 administrative law judge weighed Dr. Selby's opinion that the Miner did not have legal pneumoconiosis. Decision and Order at 44-46. Dr. Selby opined the Miner had no obstructive respiratory impairment because his pulmonary function testing was normal. Director's Exhibit 11 at 10-11. He concluded the Miner's arterial blood gas testing showed "very low pO2" and "high CO2" values, but opined the gas exchange impairment was due to congestive heart failure, obesity, deconditioning, and sleep apnea. *Id*. at 5-6, 10-11. In his deposition, Dr. Selby testified that if the Miner had an "intrinsic" pulmonary

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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).

impairment, it would be related to his very heavy cigarette smoking history. Employer's Exhibit 4 at 20.

In weighing Dr. Selby's opinion, the administrative law judge noted a preponderance of the pulmonary function testing established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 14-15, 44. He found Dr. Selby did not "address the causes of the [Miner's] respiratory impairment as reflected on his pulmonary function studies." Decision and Order at 44. He also found Dr. Selby did not address whether coal mine dust exposure was "a factor in [the Miner's] low pO2" evidenced by blood gas testing. *Id*. Further, he found Dr. Selby excluded legal pneumoconiosis because the x-ray evidence was negative for the disease. Decision and Order at 45; Employer's Exhibit 4 at 30. He found this reasoning inconsistent with the regulation that a claim "must not be denied solely on the basis of a negative chest x-ray." 20 C.F.R. §718.202(b); Decision and Order at 45; Employer's Exhibit 4 at 30. He further found Dr. Selby was equivocal as to whether congestive heart failure caused the Miner's documented shortness of breath. Decision and Order at 45. Based on the foregoing findings, the administrative law judge found Dr. Selby's opinion not well-reasoned and documented. *Id*. at 44-46. Employer does not challenge these credibility findings. Thus they are affirmed. *Young*, 947 F.3d at 405; *Napier*, 301 F.3d at 713-14; *Rowe*, 710 F.2d at 255; *Skrack*, 6 BLR at 1-711.

Employer argues the administrative law judge erred in calculating the Miner's cigarette smoking history. Employer's Brief at 6-7. The administrative law judge did not, however, discredit Dr. Selby's opinion because the doctor relied on an inflated cigarette smoking history. Thus any error in the administrative law judge's smoking history calculation is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Because it is supported by substantial evidence, we affirm the administrative law judge's finding Employer did not disprove legal pneumoconiosis and his determination it did not rebut the Section 411(c)(4) presumption by establishing the Miner did not have pneumoconiosis.[8] *See* 20 C.F.R. §718.305(d)(1)(i).

[8] Because Employer bears the burden to disprove legal pneumoconiosis, we need not address its arguments regarding the credibility of Dr. Sood's opinion diagnosing legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 6-7.

Disability Causation

The administrative law judge next considered whether Employer established "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 Dr. Selby's disability causation opinion because the doctor did not diagnose legal pneumoconiosis, contrary to his finding Employer failed to disprove the Miner had the disease.[9] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 46-49. We therefore affirm the administrative law judge's finding Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii), and affirm the award of benefits.

[9] In addressing whether the Miner's disability was caused by pneumoconiosis, Dr. Selby did not set forth an explanation independent of his conclusion that the Miner did not have legal pneumoconiosis. Director's Exhibit 11; Employer's Exhibit 4.

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

MELISSA LIN JONES
Administrative Appeals Judge