U.S. Department of Labor

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

BRB No. 20-0008 BLA

GARRY WATTS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FRASURE CREEK MINING, LLC	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 10/21/2020
	)	
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 Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for Claimant.

Paul Jones and Denise Hall Scarberry (Jones & Walter, PLLC), Pikeville, Kentucky, for Employer/Carrier.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Steven B. Berlin's Decision and Order Awarding Benefits (2015-BLA-05442) 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 claim filed on May 28, 2013.[1]

The administrative law judge credited Claimant with twenty-eight years of surface coal mine employment,[2] all of which he found took place in conditions substantially similar to those in an underground mine. He also found Claimant has a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), and therefore invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge improperly invoked the Section 411(c)(4) presumption based on his erroneous findings that Claimant had at least fifteen years of qualifying coal mine employment and is totally disabled. Employer also contends the administrative law judge erred in finding it did not rebut the presumption. Employer also challenges the administrative law judge's finding regarding the commencement date of benefits. Claimant responds in support of the award. 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. 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).

[1] Claimant filed a prior claim, but subsequently withdrew it. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] The administrative law judge found that the law of the United States Court of Appeals for the Sixth Circuit was "controlling in this Kentucky-based case." Decision and Order at 3 n.2.

[3] 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.

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

Qualifying Coal Mine Employment

Employer initially argues the administrative law judge erred in finding Claimant has sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption. Section 411(c)(4) requires at least fifteen years of employment, either in "underground coal mines," or in "coal mines other than underground coal mines" in conditions "substantially similar" to those in an underground mine. Section 718.305(b)(2) provides that "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

In considering whether Claimant's twenty-eight years of work at surface mines constituted qualifying coal mine employment,[4] the administrative law judge noted Claimant's main job was working as a dozer operator.[5] Decision and Order at 2; Director's Exhibit 27 at 10. Claimant testified that when he worked on a strip mine job, he was exposed to significant coal dust and explained that when they cleaned coal in the pits, it would create "a heavy fog" of coal dust which would blow onto him. Decision and Order at 4; Director's 27 at 10, 23. Claimant also testified he was in the vicinity of where the coal was being mined and loaded, exposing him to coal dust. Director's Exhibit 27 at 25-26. The administrative law judge credited Claimant's "uncontested testimony" and found he was regularly exposed to coal mine dust during his twenty-eight years of surface coal mine employment. Decision and Order at 4.

Employer argues Claimant testified only about his coal dust exposure on specific occasions, and not for the duration of his employment. Employer's Brief at 5-6. Contrary to Employer's contention, Claimant's testimony was not limited to describing only specific instances when he was exposed to coal dust. He testified that although he had an enclosed cab when working for Employer, he was exposed to coal dust. Director's Exhibit 27 at 22-23. Further, he testified that "in the early days" of his mining career, when he worked in open cab dozers, coal and rock dust would get into his cab such that "you could wipe your finger across the dash and you can write your name in the dust and the dirt." *Id*. at 26. He

[4] Because it is unchallenged, we affirm the administrative law judge's finding of twenty-eight years of surface coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2.

[5] The administrative law judge noted Claimant also worked as a welder, mechanic helper, heavy equipment operator, and rock truck operator. Decision and Order at 2; Director's Exhibit 27 at 10.

also testified to "significant" coal dust exposure when he "worked on a strip job," when helping to clean the loader in the pits which created dust "like a heavy fog," and when performing various jobs in the pit where ongoing mining and the loading of coal occurred. *Id.* at 22-26.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012); *Gray v. SLC Coal Co*., 176 F.3d 382 (6th Cir. 1999). The Board cannot substitute its inferences for those of the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Because it is based on substantial evidence,[6] we affirm the administrative law judge's finding that Claimant was regularly exposed to coal mine dust during his twenty-eight years of surface coal mine employment. 20 C.F.R. §718.305(b)(2); *see Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490-91 (6th Cir. 2014) (claimant need only establish regular exposure to coal dust to prove substantially similar conditions).

Total Disability

A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A miner may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge considered the medical opinions of Drs. Baker, Dahhan, Koura, and Jarboe.[7] Drs. Baker, Dahhan and Koura opined that Claimant is totally disabled from a respiratory standpoint, and unable to perform the duties of his last coal

[6] Additional evidence further supports the administrative law judge's finding. On his Employment History Form, Claimant indicated he was exposed to dust, gases, or fumes during all of his coal mine employment. Director's Exhibit 3. Claimant also indicated, in his response to interrogatories, he was exposed to dust in all of his coal mine jobs. Director's Exhibits 24 at 5; 25 at 8.

[7] The administrative law judge found the pulmonary function studies and blood gas studies did not establish total disability. 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 11-12. He also found no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 12.

mine employment as a dozer operator. Director's Exhibits 11 at 2, 32; 15 at 6; 22 at 5; Claimant's Exhibit 2 at 6. Although Dr. Jarboe diagnosed a severe gas exchange impairment, he did not address whether Claimant has a totally disabling respiratory impairment. Employer's Exhibit 2 at 10.

The administrative law judge credited the opinions of Drs. Baker, Dahhan, and Koura that Claimant has a totally disabling respiratory impairment. Decision and Order at 12. The administrative law judge noted that Dr. Jarboe also diagnosed a severe gas exchange impairment, but did not address whether it would prevent Claimant from performing his previous work as a dozer operator. *Id.* The administrative law judge also noted Dr. Koura indicated Claimant required supplemental portable oxygen at all times. *Id.*; Director's Exhibit 22 at 5. The administrative law judge therefore found the medical opinions established total disability. 20 C.F.R. §718.204(b)(2)(iv).

Employer asserts, without explanation, that neither Dr. Dahhan nor Dr. Jarboe opined that Claimant was totally disabled. Employer's Brief at 7. The administrative law judge accurately characterized their opinions, finding Dr. Dahhan opined that Claimant is totally disabled from a respiratory standpoint and Dr. Jarboe did not directly address the issue.[8] Decision and Order at 12. Moreover, contrary to Employer's characterization, the administrative law judge did not find Claimant totally disabled solely because the doctors diagnosed a severe impairment. Employer's Brief at 7. The administrative law judge based his finding of total disability on the opinions of Drs. Baker, Dahhan and Koura, each of whom opined that Claimant's respiratory impairment prevented him from performing the duties of his last coal mine employment. Decision and Order at 12.

Employer finally argues the administrative law judge erred in considering Claimant's need for supplemental oxygen as supportive of a finding of total disability. Employer's Brief at 7-8. We disagree. The administrative law judge permissibly found Claimant's need for supplemental oxygen at all times supported the medical assessments of the physicians. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983)*; Clark*, 12 BLR at 1-155. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinions established total disability. 20 C.F.R. §718.204(b)(2)(iv); *see Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005) (substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion). We also affirm, as unchallenged on appeal, the

[8] The administrative law judge accurately noted that Dr. Jarboe opined only that Claimant did not have a totally disabling respiratory impairment *caused by or substantially contributed to by the inhalation of coal mine dust or pneumoconiosis*. Decision and Order at 12. Dr. Jarboe did not indicate whether Claimant suffered a totally disabling respiratory impairment due to other causes.

administrative law judge's finding that the weight of the evidence overall established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12.

As Claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's determination he invoked the Section 411(c)(4) presumption.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish Claimant 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.

To disprove legal pneumoconiosis,[10] 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 Co.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting). The United States Court of Appeals for the Sixth Circuit has held this standard requires Employer to establish Claimant'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 administrative law judge considered the opinions of Drs. Dahhan and Jarboe that Claimant does not have legal pneumoconiosis.[11] Employer's Exhibits 1 at 5; 2 at 8-9.

[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). "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 established Claimant does not have clinical pneumoconiosis. Decision and Order at 14.

[11] The administrative law judge found the opinions of Drs. Baker and Koura did not assist Employer in establishing that Claimant does not have legal pneumoconiosis. Decision and Order at 15-16.

Dr. Dahhan diagnosed a restrictive ventilatory defect due to obesity and sleep apnea. Employer's Exhibit 1 at 5. Dr. Jarboe diagnosed disabling hypoxemia due to obesity and sleep apnea, and a restrictive ventilatory defect due to obesity. *Id.* at 2, 9-10. Dr. Jarboe also diagnosed chronic bronchitis which he attributed to non-occupational causes. *Id.* at 11. The administrative law judge found their opinions not well reasoned because they did not credibly explain how they determined Claimant's twenty-eight years of coal mine dust exposure did not contribute to his respiratory impairment. Decision and Order at 16-20.

We initially reject Employer's argument that the administrative law judge applied an improper rebuttal standard by requiring Drs. Dahhan and Jarboe to "rule out" any contribution by Claimant's coal mine dust exposure. Employer's Brief at 9-13. The administrative law judge correctly stated legal pneumoconiosis includes any chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 15; 20 C.F.R. §718.201(a)(2),(b). Moreover, he properly considered whether Employer established Claimant's coal mine dust exposure did not contribute "in part" to his pulmonary disease. *Young*, 947 F.3d at 405-407; Decision and Order at 16.

Employer also contends the administrative law judge erred in discrediting the opinions of Drs. Jarboe and Dahhan. Employer's Brief at 9-13. We disagree. The administrative law judge found Dr. Dahhan, in attributing Claimant's respiratory impairment to obesity and sleep apnea, failed to convincingly explain why Claimant's twenty-eight years of coal mine dust exposure was not also a contributing factor. Decision and Order at 18. He similarly found Dr. Jarboe's "assertion that Claimant's restrictive ventilatory defect [was] 'readily explained by his . . . obesity . . . [did] not establish that his significant history of coal mine dust exposure could not also have played a role in the development of [his] impairment." *Id.* at 17. The administrative law judge therefore permissibly accorded less weight to their opinions because they did not adequately explain why Claimant's coal mine dust exposure did not contribute to his disabling restrictive impairment. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); Decision and Order at 16-19.

The administrative law judge also noted Dr. Jarboe eliminated coal dust exposure as a cause of Claimant's chronic bronchitis because Claimant had not had any coal dust exposure for five years. Decision and Order at 18; Employer's Exhibit 2 at 11. The administrative law judge permissibly found Dr. Jarboe's opinion inconsistent with the Department of Labor's recognition that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see also* 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000) ("[I]t is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period."); *Mullins Coal Co.*

of Va. v. Director, OWCP, 484 U.S. 135, 151 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014); Decision and Order at 18.

Because the administrative law judge permissibly discredited the opinions of Drs. Dahhan and Jarboe,[12] we affirm his finding that Employer failed to establish Claimant does not have legal pneumoconiosis, precluding a rebuttal finding that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). Further, because it is unchallenged on appeal, we affirm the administrative law judge's determination that Employer failed to establish that no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, and affirm the award of benefits. *See* 20 C.F.R. §718.305(d)(1)(ii); *Skrack*, 6 BLR at 1-711.

Commencement Date of Benefits

The commencement date for benefits is the month in which the Claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603-604 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence, benefits will commence in the month the claim was filed, unless evidence the administrative law judge credits establishes the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 1119 n.4 (4th Cir. 1986); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990).

The administrative law judge awarded benefits beginning May 2013, the month in which Claimant filed his claim. Employer argues the administrative law judge erred in not addressing whether there was any medical evidence establishing when Claimant became totally disabled due to pneumoconiosis. Employer's Brief at 14. Employer therefore argues the case must be remanded for reconsideration of the commencement date of benefits. *Id.*

Contrary to Employer's argument, reconsideration of this issue is not required. The administrative law judge did not credit any evidence that Claimant was not totally disabled due to pneumoconiosis at any time subsequent to the filing date of his claim. Moreover,

[12] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Dahhan and Jarboe, any error in discrediting their opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address Employer's remaining arguments regarding the weight accorded to their opinions.

Employer does not cite to any evidence supportive of such a finding. Since the medical evidence does not reflect the date upon which Claimant became totally disabled due to pneumoconiosis, benefits are payable from the month in which he filed this claim. 20 C.F.R. §725.503(b). Therefore, we affirm the administrative law judge's determination that the date of commencement of benefits is from May 2013, the month Claimant filed his claim. 20 C.F.R. §725.503(b); *Owens*, 14 BLR at 1-49.

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

DANIEL T. GRESH
Administrative Appeals Judge