U.S. Department of Labor

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

BRB No. 17-0383 BLA

RONALD A. STEVENS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HOWARD BOWERS CONTRACTING COMPANY, INCORPORATED	)	
	)	DATE ISSUED: 04/24/2018
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 of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Evan B. Smith, Appalachian Citizens' Law Center, Inc., Whitesburg, Kentucky, for claimant.

Jared L. Buker (Dawson & Myers, LLC), Columbus, Ohio, for employer.

Jennifer L. Feldman (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2016-BLA-5411) of Administrative Law Judge Thomas M. Burke awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on September 9, 2014.

The administrative law judge credited claimant with 16.43 years of qualifying coal mine employment,[1] and found that the evidence established that he suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption,[2] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further determined that employer failed to rebut the presumption and awarded benefits accordingly.

On appeal, employer contends that claimant was not exposed to coal mine dust during the time that it employed him. Employer also argues that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject any assertion made by employer that it is not the responsible operator.[3]

[1] Claimant's coal mine employment was in Ohio. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] Because employer does not challenge the administrative law judge's finding that the evidence established that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). To the extent that employer argues that claimant's 16.43 years of coal mine employment with Bannock Coal Company (Bannock) was not qualifying, the administrative law judge permissibly rejected that argument. The "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 Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed 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).

Employer initially asserts that claimant was not exposed to coal dust during the seventeen years that it employed him. Employer's Brief at 4-8. Employer, however, does not specify the purpose of its argument or the remedy that it seeks in raising it before the Board.[4] Because the Board is not empowered to engage in de novo proceedings or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Consequently, we decline to address the significance of employer's statement.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor

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the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2). Crediting claimant's unrefuted testimony that he was exposed to coal mine dust "very often" and "75 percent" of the time while working as a surface miner for Bannock, the administrative law judge found that claimant established that he was regularly exposed to coal mine dust. Decision and Order at 7; Transcript at 9. Because it is supported by substantial evidence, we affirm the administrative law judge's finding of 16.43 years of qualifying coal mine employment. We therefore affirm his finding that claimant invoked the Section 411(c)(4) presumption.

[4] To the extent that employer is attempting to dispute its liability as the responsible operator, we agree with the Director, Office of Workers' Compensation Programs, that employer waived this issue. At the hearing, employer informed the administrative law judge that it was not contesting its designation as the responsible operator. Hearing Transcript at 5. Although employer submitted a post-hearing brief, wherein it argued that it was not liable for benefits because claimant was not exposed to coal dust while it employed him, the administrative law judge rejected this argument, noting that employer had not contested its designation as the responsible operator at the hearing. Decision and Order at 13.

clinical pneumoconiosis,[5] 20 C.F.R. §718.305(d)(1)(i), or 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). The administrative law judge found that employer failed to establish rebuttal by either method.[6]

To establish that claimant does not suffer from legal pneumoconiosis, employer must demonstrate that he does not have a chronic dust disease or impairment that is "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, 1-1-55 n.8 (2015) (Boggs, J., concurring and dissenting). In evaluating whether employer met its burden, the administrative law judge considered the opinions of Drs. Lenkey and Fino.[7] Dr. Lenkey, who conducted the Department of Labor-sponsored pulmonary evaluation, prepared a medical report, as well as two addenda. In his initial report dated December 18, 2014, Dr. Lenkey opined that claimant suffers from chronic obstructive pulmonary disease (COPD)/emphysema due to cigarette smoking. Director's Exhibit 10. After reviewing claimant's occupational history, Dr. Lenkey prepared an addendum dated March 6, 2015, wherein he opined that, based upon further inspection of claimant's occupational history, claimant's coal dust exposure contributed at least in part to his severe COPD. Director's Exhibit 18. After reviewing Dr. Fino's report, Dr. Lenkey prepared a second addendum on August 28, 2015, this time

[5] "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).

[6] The administrative law judge, however, found that employer established that claimant does not have clinical pneumoconiosis. Decision and Order at 9.

[7] The record also contains a report from Dr. Lockey. Although Dr. Lockey diagnosed "severe airway obstruction" due to cigarette smoking and Alpha-1 antitrypsin deficiency, the administrative law judge accurately noted that the doctor "did not offer an opinion on the possibility of coal dust exposure being a causative factor." Decision and Order at 6; Director's Exhibit 10.

opining that coal dust did not "in any significant way play into . . . claimant's overall poor condition." *Id.*

Dr. Fino examined claimant on June 4, 2015. In a report dated June 17, 2015 Dr. Fino diagnosed "very severe emphysema" and histoplasmosis. Director's Exhibit 16. Dr. Fino attributed claimant's emphysema to cigarette smoking. *Id.* Although Dr. Fino opined that claimant developed "histoplasmosis at one of the mines where he worked," he opined that it was not a coal dust-related impairment or disease. *Id.* During a September 7, 2016 deposition, Dr. Fino, citing a study referenced in the Preamble to the 2001 regulatory revisions, calculated that claimant, having a negative x-ray interpretation, would be expected to lose only an average of 250 cc in FEV1 to coal dust exposure. Exhibit A 20-21. Because claimant had a much greater loss in FEV1, Dr. Fino reasoned that even if claimant had not suffered a 250 cc loss in FEV1 from coal mine dust exposure, he would still be disabled. *Id.* Dr. Fino therefore opined that all of claimant's pulmonary impairment could be explained by his cigarette smoking and an Alpha-1 antitrypsin deficiency. *Id.* at 21-22.

The administrative law judge accorded less weight to Dr. Lenkey's opinion because he found that it was equivocal, noting that the physician offered three different opinions regarding whether the claimant suffered from legal pneumoconiosis. Decision and Order at 10. The administrative law judge also gave less weight to Dr. Fino's opinion because he found that the doctor applied generalized statistical conclusions that did not adequately address claimant's specific condition. *Id.* The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis.

Employer initially argues that the administrative law judge applied an improper standard by requiring Drs. Lenkey and Fino to "rule out" the existence of legal pneumoconiosis in order to rebut the Section 411(c)(4) presumption. Employer's Brief at 12, 15. We disagree. The administrative law judge correctly stated that employer bore the burden of establishing that claimant does not have legal pneumoconiosis, i.e., a lung disease significantly related to, or substantially aggravated by, dust exposure in coal mine employment. Decision and Order at 8-10; *see* 20 C.F.R. §§718.201(b), 718.305(d)(1)(i). Moreover, the administrative law judge did not reject the opinions of Drs. Lenkey and Fino because they were insufficient to meet a "rule out" standard on the existence of legal pneumoconiosis. Rather, he found their opinions not credible because they were equivocal or not based upon claimant's specific condition. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-741 (6th Cir. 2015); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007).

Employer also asserts that benefits should be denied because no physician opined that claimant's respiratory impairment was attributable to his coal dust exposure. We disagree. Employer's argument fails to recognize that, once claimant invoked the Section 411(c)(4) presumption, he was entitled to a presumption that his pulmonary disease was caused by his coal mine dust exposure. At that point, the burden shifted to employer to rebut the presumption, either by disproving the existence of pneumoconiosis or by establishing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

Although employer generally asserts that the opinions of Drs. Lenkey and Fino are sufficient to establish that claimant does not suffer from legal pneumoconiosis, employer alleges no specific error in regard to the administrative law judge's consideration of the evidence. *See Cox*, 791 F.2d at 446, 9 BLR at 2-47-48; *Sarf*, 10 BLR at 1-120-21. Because the Board is not empowered to reweigh the evidence, or to engage in a *de novo* proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Consequently, we affirm the administrative law judge's finding that employer failed to establish that claimant does not suffer from legal pneumoconiosis.[8] *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 prove that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[8] 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).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge