U.S. Department of Labor

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

BRB No. 18-0019 BLA

ROBERT LEE HYLTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ITMANN/CONSOLIDATION COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 04/29/2019
CONSOL ENERGY 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 on Remand of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

Kathy L. Snyder and Andrea Berg (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Michelle S. Gerdano (Kate S. O'Scannlain, Solicitor of Labor; Barry Joyner, 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: BOGGS, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2012-BLA-05773) of Administrative Law Judge Adele H. Odegard rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on November 4, 2010, and is before the Board for the second time.[1]

In her initial decision, issued on May 8, 2015, the administrative law judge credited claimant with 15.23 years of underground coal mine employment, and found the new evidence established claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). She therefore found claimant invoked the presumption of disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] The administrative law judge further found employer did not rebut the presumption and awarded benefits.

Pursuant to employer's appeal, the Board affirmed, as unchallenged, the administrative law judge's findings that the new evidence established disability and a

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[1] Claimant's prior claim, filed on September 27, 1990, was denied by the district director on March 25, 1991, for failure to establish any element of entitlement. Director's Exhibits 1, 3.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen 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. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] Where 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 that "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(c); *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(c)(3).

change in an applicable condition of entitlement. The Board vacated, however, the administrative law judge's finding that claimant established 15.23 years of qualifying coal mine employment. The Board held she failed to conduct the threshold inquiry of whether claimant established a calendar year of employment prior to determining claimant worked at least 125 days within that year and, therefore, erred in crediting him with 365 days of employment if his income exceeded the industry average for 125 days.

The Board remanded the case to the administrative law judge to reconsider the length of claimant's coal mine employment while taking into account the documentary evidence in the record. The Board also instructed her to reconsider whether claimant's work at Mercer Welding, Owens Manufacturing, and Amigo Smokeless Coal Company (Amigo Smokeless) constituted qualifying coal mine employment. Because the Board vacated the administrative law judge's finding of 15.23 years of qualifying coal mine employment, it also vacated her finding that claimant invoked the Section 411(c)(4) presumption.

The Board also addressed employer's allegations of error in the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption. It vacated the administrative law judge's rejection of the opinions of Drs. Basheda and Fino on clinical pneumoconiosis because she failed to consider all relevant evidence. The Board affirmed her rejection of Dr. Baheda's opinion on legal pneumoconiosis, but determined she failed to comply with the duty of explanation required by the Administrative Procedure Act in discounting Dr. Fino's opinion.[4] The Board therefore vacated the administrative law judge's findings that employer failed to disprove the existence of clinical and legal pneumoconiosis.[5] Accordingly, the Board held that if the administrative law judge determined on remand that claimant had at least fifteen years of qualifying coal mine employment, she must consider and weigh all relevant evidence to determine whether it is

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[4] The Administrative Procedure Act provides every adjudicatory decision must be accompanied by a statement of "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).

[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). "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).

sufficient for employer to establish rebuttal of the presumption. *Hylton v. Itmann/Consolidation Coal Co*., BRB No. 15-0321 BLA (Jan. 30, 2017) (unpub.).

On remand, the administrative law judge credited claimant with 16.73 years of qualifying coal mine employment, including 0.97 of surface employment at Amigo Smokeless, and again found claimant invoked the Section 411(c)(4) presumption.[6] The administrative law judge further found employer did not rebut the presumption and awarded benefits.

In the present appeal, employer challenges the administrative law judge's finding that claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Employer also challenges its designation as the responsible operator, asserting that if the administrative law judge's determinations regarding the length of coal mine employment are upheld, it must be dismissed and liability for any benefits must transfer to the Black Lung Disability Trust Fund. Further, employer contends the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption. Claimant did not file a response brief in this appeal. The Director, Office of Workers' Compensation Programs, filed a limited response arguing employer waived its right to contest its designation as the responsible operator by conceding the issue before the administrative law judge and failing to raise it when the case was initially before the Board.

The 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.[7] 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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[6] The administrative law judge determined claimant's work as a welder with Mercer Welding and Owens Manufacturing did not constitute qualifying coal mine employment, while his work as a mechanic with Amigo Smokeless was coal mine employment. Decision and Order on Remand at 15-16 n.17.

[7] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order on Remand at 3; Director's Exhibit 4.

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

Because claimant established total disability, he is entitled to the Section 411(c)(4) presumption if he had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. Conditions in an underground mine are "substantially similar" if claimant was "regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2). Claimant bears the burden of proof 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). Because the regulations provide only limited guidance for calculating the length of a miner's coal mine employment, an administrative law judge's determination based on a reasonable method of computation and supported by substantial evidence will be upheld. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

Employer argues that in crediting claimant with 16.73 years of coal mine employment the administrative law judge "skipped the first step of the required analysis," by failing determine whether claimant had a calendar year of coal mine employment, before determining claimant was regularly employed for at least 125 days within that year. Employer's Brief at 8-15.

Contrary to employer's argument, the administrative law judge followed the Board's remand instructions and applied the two-step process required by the regulations and applicable case law. She began her analysis by reviewing: the employment information from claimant's applications for benefits; his employment history forms and work descriptions; the district director's findings; an employment letter from Tazewell Energy; claimant's pay stubs from Dry Fork Coal Company, Rocke Coal Company, and Lo-Boy Trucking; claimant's testimony; and his Social Security Administration (SSA) earnings record. Decision and Order on Remand at 6-12; Director's Exhibits 1, 3, 4-7, 10, 37; Hearing Transcript at 17, 19-21, 23-24. The administrative law judge determined the direct evidence is insufficient to establish the beginning and ending dates of claimant's employment, finding it largely inconsistent.[8] Thus, she relied on claimant's SSA earnings

[8] For example, the administrative law judge noted claimant alleged 15.5 years of coal mine employment in his 1990 claim but 24 years in his 2010 claim, while conceding he might not have worked 24 "full years." Decision and Order on Remand at 10-11. He also alternately listed his year of retirement as 1992 and 1993. *Id.* at 11. Further, the district director found a 14 year employment history in claimant's 1990 claim, but a 17 year history in his 2010 claim. *Id.* The administrative law judge also found claimant's pay

record as the most accurate evidence of the number of years claimant worked in coal mine employment. Decision and Order on Remand at 6-13. Noting the regulations do not provide a method for determining a calendar year of coal mine employment, the administrative law judge explained that "[a]bsent evidence in the alternative" she would assume claimant's credible SSA records reflect year-long relationships with the listed employers for each given year from 1973 to 1993.[9] *Id.* at 13. Then, for each calendar year, the administrative law judge applied the formula at 20 C.F.R. §725.101(a)(32)(iii) to credit claimant with a total of 16.73 years of coal mine employment.[10] *Id*. at 18. Thus, contrary to employer's argument, the administrative law judge applied the two-step process required by the regulations.[11] *See* 20 C.F.R. §§718.301, 725.101(a)(32).

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stubs were not exhaustive and, while evidence of time worked, did not necessarily prove the lack of employment for periods not represented by pay stubs. *Id.* at 11-12. She gave weight, however, to the Tazewell Energy employment letter as a business document from a neutral party. *Id.* at 12.

[9] In relying on claimant's Social Security Administration (SSA) earnings records to establish the requisite calendar years of employment, the administrative law judge explained she declined to follow the Board's unpublished decision in *Mayhew v. Adkins and Webb Coal Co.*, BRB Nos. 10-0654 and 10-0654 BLA-A (Aug 25, 2011) (unpub), which she stated precluded the use of SSA earnings records that are not broken into quarters to establish a calendar year of employment. Decision and Order on Remand at 13. Employer asserts the administrative law judge erred in failing to apply this "relevant precedent." Employer's Brief at 14. As employer concedes, however, the administrative law judge misstated the holding in *Mayhew*, which precluded the use of *claimant's general testimony* to establish a calendar year of employment where there was no evidence of the beginning and ending dates of claimant's employment, and the SSA earning records were not broken down into quarters. *Mayhew*, BRB Nos. 10-0654 and 10-0654 BLA-A, slip op. at 4; Employer's Brief at 10. As *Mayhew* is factually distinguished from this case and, moreover, is not binding precedent we reject employer's arguments to the contrary and hold the administrative law judge was not required to apply it.

[10] The administrative law judge noted this is consistent with the district director's finding, in the 2010 claim, of a 17-year coal mine employment history. Decision and Order on Remand at 7, 11 n.6; Director's Exhibit 37.

[11] As employer raises no specific challenge to the administrative law judge's determination that "[C]laimant has established that he held 'employment relationship[s]' .

Employer next challenges the administrative law judge's finding that claimant's employment with Amigo Smokeless took place in conditions substantially similar to those in an underground mine. Employer's Brief at 16-17. We need not resolve this issue. The administrative law judge credited claimant with 0.97 years of coal mine employment with Amigo Smokeless. Decision and Order on Remand at 16. Even if claimant's employment with Amigo Smokeless does not constitute qualifying employment, claimant would still be credited with 15.76 years of qualifying coal mine employment (16.73 years – 0.97 years). *Id*. at 18. Thus, any error by the administrative law judge in including employment with Amigo Smokeless would be 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). As employer raises no further specific allegations of error regarding the administrative law judge's length of coal mine employment determination, we affirm the administrative law judge's findings that claimant has at least fifteen years of qualifying coal mine employment, and invoked the Section 411(c)(4) presumption.[12]

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 rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis, 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)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

. . with coal mine employers for each calendar year of his employment," it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13.

[12] We decline to address employer's argument that it must be dismissed as the responsible operator and liability for any benefits should transfer to the Black Lung Disability Trust Fund. As noted by the Director, Office of Workers' Compensation Programs, employer conceded before the administrative law judge that it is the responsible operator. Director's Brief at 1, *citing* Hearing Transcript at 16. The administrative law judge accepted this concession, and it is binding on appeal. *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013); *Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996); 2015 Decision and Order at 2 n.2. Moreover, employer is also precluded from contesting its liability by failing to raise it in the prior appeal. *See Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982).

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 v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). On remand, the administrative law judge reconsidered Dr. Fino's opinion, that claimant does not have legal pneumoconiosis but an obstructive impairment due to smoking-related emphysema. Director's Exhibit 30; Employer's Exhibit 8. Employer argues the administrative law judge erred in finding his opinion not well reasoned. Employer's Brief at 21-25. We disagree.

The administrative law judge accurately observed that Dr. Fino acknowledged claimant's obstructive impairment may be due, in part, to coal mine dust exposure, but excluded a diagnosis of legal pneumoconiosis opining that the degree of obstruction related to coal mine dust would not be clinically significant. Director's Exhibit 30 at 10-11. Relying on medical literature, Dr. Fino stated, "[s]tatistically speaking, about 80-90% of [] miners suffered an average loss of FEV1," and studies show "only 6-8% of miners exposed to coal mine dust *at the present dust standards for 35 years* will develop clinically important losses in FEV1." *Id*. at 10 (emphasis added). He added an above average loss would arise out of very significant exposures to coal mine dust. *Id.* at 11.

The administrative law judge permissibly discredited Dr. Fino's opinion as based, in part, on generalities, rather than on the specifics of claimant's case, as Dr. Fino did not know the amount of dust to which claimant was actually exposed. *See Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order on Remand at 21. The administrative law judge further permissibly found Dr. Fino did not adequately explain why claimant was not one of the minority of miners who develops clinically significant obstructive lung disease from coal mine dust exposure. *See* 20 C.F.R. §718.201(b); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order on Remand at 23 n.35. We therefore affirm the administrative law judge's discounting of Dr. Fino's opinion as supported by substantial evidence and in accordance with law.[13] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000). Consequently, we affirm her finding employer failed

[13] Because the administrative law judge provided valid reasons for discrediting Dr. Fino's opinion, we need not address employer's remaining arguments regarding the weight accorded to his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

to rebut the Section 411(c)(4) presumption by establishing claimant does not have pneumoconiosis.[14] 20 C.F.R. §718.305(d)(1)(i); Decision and Order on Remand at 22.

The administrative law judge next addressed whether employer established rebuttal by proving "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). She permissibly found that the same reasons for which she discredited Dr. Fino's opinion that claimant does not have legal pneumoconiosis also undercut his opinion that claimant's disabling impairment is unrelated to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); Decision and Order on Remand at 23 n.35. Employer has not raised any specific challenge to this finding. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). We therefore affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii). Decision and Order on Remand at 23.

[14] 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). Therefore, we need not address employer's contentions of error regarding the administrative law judge's finding that employer failed to disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 6-10.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge