U.S. Department of Labor

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

BRB No. 17-0517 BLA

DANIEL NAPIER Claimant-Petitioner v. IKERD BANDY COMPANY, INCORPORATED and ZURICH AMERICAN INSURANCE Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/27/2018 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Daniel Napier, Hyden, Kentucky.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2016-BLA-05056) of Administrative Law Judge Christopher Larsen rendered 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 miner's claim filed on March 28, 2014.

The administrative law judge credited claimant with twenty-four and three-quarter years of surface coal mine employment but found that the evidence did not establish that the employment took place in conditions substantially similar to those underground. Thus he found that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C §921(c)(4) (2012). He also found that because the record lacks evidence of complicated pneumoconiosis, the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act is inapplicable. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304.

Considering whether claimant could establish entitlement without the aid of the Section 411(c)(3) or Section 411(c)(4) presumptions, the administrative law judge found that while claimant did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), he established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b).[3] He also found that claimant established total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge further found, however, that claimant did not establish that his

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[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Napier is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant establishes 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] "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).

total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) and denied benefits accordingly.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Neither employer/carrier, nor the Director, Office of Workers' Compensation Programs, filed a response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are 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).

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

Qualifying Coal Mine Employment

To invoke the presumption, claimant must establish that he had at least fifteen years of employment either "in one or more underground coal mines," or in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). 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 miner was regularly exposed to coal-mine dust while working there."[5] 20 C.F.R. §718.305(b)(2); *see*

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[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[5] The comments accompanying the Department of Labor's regulations clarify claimant's burden in establishing substantial similarity:

> [T]he claimant need only focus on developing evidence addressing the dust conditions prevailing at the non-underground mine or mines at which the miner worked. The objective of this evidence is to show that the miner's duties regularly exposed him to coal mine dust, and thus that the miner's work conditions approximated those at an underground mine. The term "regularly" has been added to clarify that a demonstration of sporadic or incidental exposure is not sufficient to meet the claimant's burden. The fact-finder simply evaluates the evidence presented, and determines whether it

Brandywine Explosives & Supply v. Director, OWCP [*Kennard*], 790 F.3d 657, 663, 25 BLR 2-725, 2-730 (6th Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90, 25 BLR 2-633, 2-642-43 (6th Cir. 2014).

The administrative law judge credited claimant with "just under" twenty-five years of surface coal mine employment as a heavy equipment mechanic.[6] Decision and Order at 5; Hearing Tr. at 7-9. The administrative law judge found, however, that "the record in this case contains almost no information about [claimant's] specific duties at his various coal mine jobs, or the conditions under which he worked." Decision and Order at 6. In so finding, the administrative law judge noted that while claimant responded "yes" to the question on the Employment History form (Form CM-911) filed with his claim, asking whether he was exposed to dust, gases or fumes when he worked for each of his employers, he did not indicate the nature or extent of this exposure. Decision and Order at 6; *see* Director's Exhibit 3. The administrative law judge further noted that while claimant described the exertional requirements of his jobs on the Description of Coal Mine Work and Other Employment form (Form CM-913), including the various types of heavy equipment he operated, he again did not describe the conditions under which he worked.[7]

> credibly establishes that the miner's non-underground mine working conditions regularly exposed him to coal mine dust. If that fact is established to the fact-finder's satisfaction, the claimant has met his burden of showing substantial similarity.

78 Fed. Reg. 59,105 (Sept. 25, 2013).

[6] Claimant testified that all of his coal mine work was at surface mines. Decision and Order at 5; Hearing Tr. at 7-9.

[7] The medical opinions of Drs. Alam and Rosenberg do not elaborate on the nature or extent of claimant's coal dust exposure in his surface coal mine employment. In a May 7, 2014 medical report, Dr. Alam noted "22 proven years of [coal mine employment] by [the Department of Labor]" in "surface coal mining" as a mechanic, but he did not provide any further description of claimant's coal dust exposure. Director's Exhibit 10. In a January 14, 2015 medical report, Dr. Alam similarly noted that claimant "worked 22 years of surface mining." *Id.* In a June 15, 2015 report, Dr. Rosenberg stated that claimant's work history "was notable for 22 years of coal mine employment." Employer's Exhibit 1. Noting that claimant was a mechanic at surface mines, Dr. Rosenberg stated that claimant would repair equipment on the mountain. *Id.* Dr. Rosenberg also noted that claimant operated a loader and helped clean coal with a broom for several years. *Id.* Dr. Rosenberg

Decision and Order at 6; Director's Exhibit 4. Thus the administrative law judge concluded that "there is no indication . . . as to whether or how often during the course of his workday he was exposed to coal or rock dust, or under what circumstances." Decision and Order at 6.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Here, the administrative law judge considered all of the relevant evidence of record and permissibly found that the evidence does not establish that claimant was regularly exposed to coal mine dust during his surface coal mine employment. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 6, 11. Therefore, the administrative law judge rationally concluded that claimant did not demonstrate that he worked for the requisite fifteen years in conditions substantially similar to those in an underground coal mine. *See Sterling*, 762 F.3d at 489-90, 25 BLR at 2-642-43; *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1343-44, 25 BLR 2-549, 2-564-66 (10th Cir. 2014); *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988).

We affirm the administrative law judge's finding that claimant did not establish fifteen years of qualifying coal mine employment because it is supported by substantial evidence. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). Consequently, we affirm the administrative law judge's finding that claimant cannot invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

Entitlement under 20 C.F.R. Part 718

Existence of Pneumoconiosis

Without the benefit of the Section 411(c)(3)[8] and Section 411(c)(4) presumptions, claimant has the burden to establish the existence of pneumoconiosis, that the

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did not elaborate, however, on the extent to which claimant was exposed to coal mine dust. *Id.*

[8] Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption of total disability or death due to pneumoconiosis if the miner suffers or suffered from a chronic dust disease of the lung which: (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a

pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP,* 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

The administrative law judge found that the x-ray and medical opinion evidence establish that claimant has clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), but does not establish legal pneumoconiosis. A finding of clinical pneumoconiosis is sufficient to support a finding of pneumoconiosis at 20 C.F.R. §718.202. *See* 20 C.F.R. §718.201(a). We address the administrative law judge's findings on the issue of legal pneumoconiosis, however, as the existence of legal pneumoconiosis is relevant to the issue of disability causation.

Legal pneumoconiosis 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(a)(2), (b). The administrative law judge considered the medical opinion of Dr. Alam, together with claimant's medical treatment records.[9] Decision and Order at 12-13. Dr. Alam diagnosed legal pneumoconiosis, in the form of severe airflow obstruction related to coal mine dust exposure and smoking. Director's Exhibit 10. The administrative law judge discredited the opinion of Dr. Alam as conclusory and found that claimant failed to establish the existence of legal pneumoconiosis.[10] Decision and Order at 12.

A physician need not apportion a specific percentage of a miner's lung disease to cigarette smoke versus coal mine dust exposure to establish the existence of legal

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condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The irrebuttable presumption is not available in this case because the administrative law judge correctly found that the record contains no evidence of complicated pneumoconiosis. Decision and Order at 12.

[9] The treatment records, dating from January 19, 2016 to October 13, 2016, are also from Dr. Alam and show that he assessed claimant with coal workers' pneumoconiosis and chronic obstructive pulmonary disease. Decision and Order at 9.

[10] The administrative law judge also considered, and discredited, Dr. Rosenberg's opinion that claimant does not have legal pneumoconiosis. Decision and Order at 12-13; Employer's Exhibit 1. Nonetheless, Dr. Rosenberg's opinion does not assist claimant in meeting his burden at 20 C.F.R. §718.202(a)(4).

pneumoconiosis, provided that the physician has credibly diagnosed a chronic 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); *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-22 (6th Cir. 2000). Here, however, the administrative law judge permissibly discredited Dr. Alam's opinion, in part, because he provided no rationale for his conclusion that coal mine dust contributed, along with cigarette smoke, to claimant's obstructive impairment.[11] *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2002); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); Decision and Order at 12; Director's Exhibit 10. Thus he permissibly found that Dr. Alam's opinion is not credible. *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-512. Because there is no other medical opinion evidence supportive of a finding of legal pneumoconiosis, we affirm the administrative law judge's finding that claimant did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Disability Causation

To establish that total disability is due to pneumoconiosis, claimant must establish that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii). Because claimant established the existence of clinical pneumoconiosis but not legal pneumoconiosis, the relevant inquiry before the administrative law judge was whether claimant's clinical pneumoconiosis is a substantially contributing cause of his total disability. 20 C.F.R. §718.204(c).

Dr. Alam stated that clinical and legal pneumoconiosis together account for 40% of claimant's disabling pulmonary impairment, that coronary artery disease and cardiomyopathy account for 30%, and that tobacco abuse accounts for the remaining 30%. Director's Exhibit 10. The administrative law judge discredited Dr. Alam's opinion that

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[11] Because the administrative law judge provided a valid reason for discrediting Dr. Alam's opinion, the administrative law judge's error, if any, in discrediting his opinion for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co*., 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 12-13, 15.

claimant has legal pneumoconiosis as inadequately explained, however, and Dr. Alam did not state the extent to which clinical pneumoconiosis alone contributed to claimant's disabling impairment. Decision and Order at 12; Director's Exhibit 10. Thus, referencing his prior determination, which we have affirmed, the administrative law judge permissibly found that Dr. Alam's summary opinion is not sufficient to establish that pneumoconiosis is a "substantially contributing cause" of claimant's total disability pursuant to 20 C.F.R. §718.204(c). *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; Decision and Order at 15. As it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence does not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[12] *See Crisp,* 866 F.2d at 185, 12 BLR at 2-129*; Rowe,* 710 F.2d at 255, 5 BLR at 2-103.

Because claimant failed to establish total disability due to pneumoconiosis, an essential element of entitlement under 20 C.F.R. Part 718, we affirm the denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[12] Dr. Rosenberg opined that claimant's restrictive impairment was due to extrinsic obesity and not pneumoconiosis. Employer's Exhibit 1. The administrative law judge discredited Dr. Rosenberg's opinion, however, as based in part on his determination that claimant does not have clinical pneumoconiosis, contrary to the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 15. Nonetheless, Dr. Rosenberg's opinion does not assist claimant in meeting his burden at 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge