U.S. Department of Labor

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

BRB No. 17-0531 BLA

OLLIE J. NOBLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KENTUCKY FUEL CORPORATION	)	DATE ISSUED: 08/14/2018
	)	
and	)	
	)	
CHARTIS CASUALTY COMPANY	)	
	)	
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 Christopher Larsen, Administrative Law Judge, United States Department of Labor.

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

Tighe Estes and Brian W. Davidson (Fogle Keller Purdy, PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-05174) of Administrative Law Judge Christopher Larsen rendered on a miner's claim filed on July 20, 2012, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Based on the parties' stipulation, the administrative law judge credited claimant with twenty-nine years of surface coal mine employment, which he found was in conditions substantially similar to those in an underground mine. He also found that claimant has a totally disabling respiratory or pulmonary impairment and, therefore, invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis.[1] The administrative law judge further determined that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that all of claimant's surface coal mine employment was in conditions substantially similar to those in an underground coal mine and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also asserts that the administrative law judge erred in finding that it did not rebut the presumption.[2] Claimant responds, urging

[1] Under Section 411(c)(4) of the Act, a miner's total disability is presumed to be 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b).

[2] Ten months after filing its brief in support of its petition for review, employer filed a Motion to Remand this claim for a new hearing before a new administrative law judge, raising for the first time on appeal a challenge to the administrative law judge's authority to decide this claim. Employer's Motion for Remand at 1-2. Claimant and the Director respond, asserting that the motion should be denied because employer failed to timely raise its Appointments Clause argument. *See* Claimant's Response to Motion to Remand; Director's Response to Motion to Remand. We agree with claimant and the Director. Because employer did not raise its Appointments Clause argument until ten months after filing its opening brief, it forfeited the issue. *See Lucia,* 585 U.S. at , 2018 WL 3057893 at *8 (July 21, 2018) (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); s*ee also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982).

affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[3]

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.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Invocation of the Presumption – Qualifying Coal Mine Employment

Employer initially challenges the administrative law judge's finding that the conditions in the miner's surface coal mine employment were substantially similar to those in an underground coal mine. Employer contends that the administrative law judge erred by not making a specific finding concerning claimant's working conditions with each employer and instead relying on claimant's general statements that he was exposed to coal dust at every surface coal mine job he held. Employer also asserts that exposure to coal dust does not necessarily equate to conditions substantially similar to those in an underground coal mine.

We reject employer's arguments. 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 [he] was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

In finding the conditions of claimant's surface work to be substantially similar to those in underground coal mines, the administrative law judge relied on claimant's uncontradicted testimony concerning the dust conditions he experienced while working as a blaster, driller, and grader. Decision and Order at 3-5, 7. At a deposition taken by employer on June 13, 2013, claimant testified that as a blaster, he "had to follow the drills,

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant had twenty-nine years of surface coal mine employment and established a totally disabling respiratory or pulmonary impairment at 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 2, 22-23.

[4] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibits 3, 6. Accordingly, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

which they come, you know, up a lot of dust, but back then we had to do their job so I was in dust constantly most of the time." Director's Exhibit 15A at 10. Claimant also stated that he was exposed to coal dust when blasting because he followed directly behind the drill creating holes, which he loaded with explosive charges. *Id*. at 24. Claimant further stated that it was "so dusty you couldn't see. You just have to back off then." *Id*. In addition, claimant testified that when blasting "you load the holes, when you push all that in there, the dust falls right back up out the holes." *Id*. at 26. Regarding his job as a driller, claimant explained in his hearing testimony that even though he worked at times in an enclosed cab, "you can't keep [the coal dust] out," and that when he drilled, the dust came out "all over." Hearing Transcript at 16-17. Claimant stated that while working for employer, he "[ran] a grader and [ran] a drill some," and that he was regularly exposed to coal dust while other workers were drilling, sweeping, and loading coal. *Id*. at 20.

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). In particular, assessing the credibility of witness testimony is committed to the administrative law judge's discretion in his role as fact-finder, and the Board will not disturb his findings unless they are inherently unreasonable. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc).

The administrative law judge reviewed claimant's unrebutted testimony in detail and permissibly found it credible and sufficient to establish that claimant was regularly exposed to coal dust during his coal mine employment at surface mines placing blasting charges, running a drill, and operating a grader. *See Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90, 25 BLR 2-633, 2-642-43 (6th Cir. 2014); *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 25 BLR 2-549 (10th Cir. 2014); Decision and Order at 2-7; Hearing Transcript at 15-20, 22-23; Director's Exhibit 15A at 8-13, 22-26. Claimant's Social Security Administration Statement of Earnings shows that he worked continuously as blaster, driller and/or grader from 1989 to July 12 or 13, 2012, which is well in excess of fifteen years.[5] Therefore, we affirm the

[5] According to claimant's Social Security Administration (SSA) Statement of Earnings and deposition testimony, he worked as a blaster and driller for Panbowl Energy Company, Appalachian Mining, Addington Incorporated, Dyno East Kentucky Incorporated, Leslie Resources, Dyno Nobel Incorporated, and Virginia Drilling Company from 1989 to June 12, 2011, totaling approximately 21.45 years of coal mine employment. Director's Exhibits 5, 15A at 14. Claimant's SSA Statement of Earnings and deposition testimony also indicate that he worked as a driller and grader for employer from June 12,

administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.[6] 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i); *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order at 21. Accordingly, we further affirm the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption.

II. Rebuttal of the Presumption

Because claimant successfully invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis,[7] or that "no part of the [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer rebutted the presumed existence of clinical pneumoconiosis but failed to establish that the miner did not have legal pneumoconiosis or that it played no part in his total disability.

2011 to July 12 or 13, 2012, or approximately 1.08 additional years, for a total of approximately 22.53 years of coal mine employment. Director's Exhibits 5, 15A at 14-15.

[6] Claimant's SSA Statement of Earnings and Form CM-911 – Employment History show that he also worked as a truck driver at surface coal mines. Director's Exhibits 3, 5. Although the administrative law judge did not specifically address whether this work took place in conditions substantially similar to those an underground coal mine, remand is not required on this basis. Because claimant's coal mine employment as a blaster, driller, and grader exceeds the fifteen years required to invoke the Section 411(c)(4) presumption, any error by the administrative law judge is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[7] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id*. 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).

Employer initially argues that the administrative law judge's "approximate finding" of a forty-year smoking history "is not sufficient to address" the credibility of the medical opinions diagnosing legal pneumoconiosis. Employer's Brief at 18. Employer further contends that the administrative law judge applied an incorrect burden of proof in considering rebuttal. Employer also alleges that the administrative law judge erred in rejecting the opinions of Drs. Dahhan and Broudy that claimant does not suffer from legal pneumoconiosis.[8]

We reject employer's contentions regarding the finding that claimant has an approximately forty-year history of smoking, as the administrative law judge's determination is supported by substantial evidence. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985). As the administrative law judge noted, the physicians who examined claimant recorded the following smoking histories: In a 2012 report, Dr. Forehand indicated that claimant started smoking between the ages of eighteen and twenty and smoked a pack of cigarettes per day; Dr. Baker stated in his 2015 report that claimant began smoking at age eighteen and continued to smoke a pack per day; in a 2013 report, Dr. Broudy recorded a smoking history of a pack per day for thirty-eight years; and Dr. Dahhan indicated in his 2016 report that claimant started smoking an average of a pack per day at age twenty and is a current smoker.[9] Decision and Order at 7-8; Director's Exhibits 11, 12; Claimant's Exhibit 1; Employer's Exhibits 7, 8 at 7, 9 at 7. The administrative law judge also accurately found that claimant's testimony at his deposition and the hearing was consistent with his reports to the physicians. Decision and Order at 8. At claimant's deposition, he stated that he began smoking at approximately age eighteen and smoked "about" a pack per day. Director's Exhibit 15A at 18-19. Claimant testified at the hearing that he had been a smoker for thirty-eight years and usually smoked a pack per day. Hearing Transcript at 24. Based on the physicians' reports and claimant's testimony, the administrative law judge rationally concluded, "the evidence [is] consistent with a finding that [claimant] has

[8] Employer also argues that the administrative law judge "did not adequately address the inaccurate smoking histories obtained by [Drs.] Forehand and Baker" or properly weigh their opinions on rebuttal. Employer's Brief at 18. We need not address these arguments, however, as both physicians diagnosed legal pneumoconiosis and, therefore, their opinions do not support employer's burden on rebuttal. *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").

[9] Claimant was born on October 31, 1956, Director's Exhibits 1, 11, and thus was fifty-nine years old on the date of the August 12, 2016 hearing.

a smoking history of approximately [forty] years, at the rate of at least one pack of cigarettes a day." *See Bobick*, 13 BLR at 1-54; *Maypray*, 7 BLR at 1-686; Decision and Order at 8. Therefore, we affirm this finding.

With respect to the proper legal standard for rebuttal of legal pneumoconiosis, we agree with employer that the administrative law judge misstated the standard when he said that it is employer's burden "to show that in [claimant's case], coal-dust inhalation played no role whatever, even as a contributing cause."[10] Decision and Order 29. The proper standard for disproving legal pneumoconiosis requires employer to prove by a preponderance of the evidence that claimant does not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *see Minich*, 25 BLR at 1-159. In other words, to rebut the presumed existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A), employer need not completely "rule out" a contribution by coal dust exposure, but instead must show that coal dust is not a "significant" contributor.

Despite this misstatement by the administrative law judge, we need not remand this claim for further consideration, as the administrative law judge did not rely on an improper "rule out" standard to discredit the opinions of Drs. Dahhan and Broudy. *See Larioni*, 6 BLR at 1-1278. The administrative law judge permissibly determined that Dr. Dahhan's opinion was insufficient to satisfy employer's burden on rebuttal because Dr. Dahhan relied on "statistical generalities, as opposed to any findings specific to [claimant]" to conclude that claimant's obstructive impairment was caused solely by cigarette smoking.[11] Decision and Order at 29; *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). Moreover, the administrative law judge rationally determined that Dr. Broudy's opinion, based in part on the partial reversibility seen on claimant's pulmonary function tests after bronchodilators, was also insufficient to establish rebuttal, as Dr. Broudy did not adequately explain why coal dust could not also have contributed to claimant's respiratory

[10] We note that the administrative law judge also cited the proper standard several times in his Decision and Order. Decision and Order at 26, 27-30.

[11] Dr. Dahhan testified that "taking the data into analysis, [claimant's impairment] is all obstructive with no restrictive component to it ruling out any interstitial lung disease." Employer's Exhibit 9 at 8. Dr. Dahhan also stated that "[t]he literature suggests five to nine cc loss in the FEV1 per year of coal dust exposure. This individual obviously has lost much more than that." *Id*. at 8-9. Dr. Dahhan explained that he then looked to other causes of FEV1 loss, like claimant's lengthy smoking habit, as "coal dust exposure can't cause this amount of loss in FEV1." *Id*. at 9.

impairment, particularly in light of the fact that claimant's pulmonary function studies are qualifying for total disability both before and after the administration of bronchodilators.[12] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); Decision and Order at 27-28. Accordingly, we affirm the administrative law judge's finding that employer did not rebut the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).

Turning to the second method of rebuttal, disability causation, the administrative law judge permissibly discounted the opinions of Drs. Dahhan and Broudy because neither physician diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that employer did not disprove that claimant has the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); Decision and Order at 31. We affirm the administrative law judge's finding that employer failed to rebut the presumed fact that claimant is totally disabled due to legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(ii), because employer has not challenged it on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 30-31. Based on our affirmance of the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption under either method, we affirm the award of benefits. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Minich*, 25 BLR at 1-154-56.

[12] Dr. Broudy diagnosed claimant with an "extremely severe obstruction, which is slightly reversible" and explained that "with lung disease due to coal dust exposure, one does not expect to see any reversibility with bronchodilators." Director's Exhibit 12. Dr. Broudy concluded that claimant's smoking history is significant and "is sufficient in and of itself to cause the claimant's pulmonary impairment." *Id*. At his deposition, Dr. Broudy testified that he did not completely rule out coal dust as a contributing cause but that the "overwhelming body of evidence" pointed to cigarette smoking as the sole cause of claimant's respiratory impairment. Employer's Exhibit 8 at 25.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge