U.S. Department of Labor

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

BRB No. 18-0244 BLA

SAMUEL L. COLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GARDEN CREEK POCAHONTAS COMPANY	)	DATE ISSUED: 08/28/2019
	)	
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 Awarding Benefits of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Sarah M. Hurley (Kate S. O'Scannlain, Solicitor of Labor; Barry H. 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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2015-BLA-05563) of Administrative Law Judge Morris D. Davis, 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 January 23, 2014.[1]

The administrative law judge determined that claimant established more than fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. He therefore found claimant established a change in an applicable condition of entitlement and invoked the rebuttable presumption of total disability due to pneumoconiosis.[2] 30 U.S.C. §921(c)(4) (2012). He further found employer failed to rebut the presumption and awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding claimant performed the work of a miner for at least fifteen years. Employer also asserts that the administrative law judge erred in determining that it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The

[1] Claimant filed a claim on August 16, 2002, which was denied by the district director on May 15, 2003, because claimant did not establish any of the elements of entitlement. Director's Exhibit 1. Claimant did not take any further action until he filed the current claim. Director's Exhibit 3. When 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). Thus, claimant was required to submit new evidence establishing at least one element of entitlement in order to obtain review of the merits of the subsequent claim. 20 C.F.R. §725.309(c)(3).

[2] Pursuant to Section 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

Director, Office of Workers' Compensation Programs (the Director), filed a limited brief, urging the Board to affirm the administrative law judge's coal mine employment finding.[3]

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.[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).

Invocation of the Presumption – Length of Qualifying Coal Mine Employment

Claimant has the burden to establish at least fifteen years of qualifying coal mine employment to invoke the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(i). Employer concedes claimant worked for twenty-four years aboveground at an underground mine, but alleges the administrative law judge erred in finding his last ten to twelve years as a heavy equipment operator was the work of a miner. Employer's Brief at 3-8.

Pursuant to Section 402(d) of the Act, a "miner" is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. §902(d). The implementing regulation, set forth at 20 C.F.R. §725.202(a), provides "a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner." *See also* 20 C.F.R. §725.101(a)(19). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this cases arises, has held that duties that meet situs and function requirements constitute the work of a miner as defined in the Act. *See Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 41, 14 BLR 2-139, 2-143 (4th Cir. 1991); *Collins v. Director, OWCP*, 795 F.2d 368, 372-73 (4th Cir. 1986); *Eplion v. Director, OWCP*, 794 F.2d 935, 937 (4th Cir. 1986). Under the situs requirement, the work must take place in or around a coal mine or coal preparation facility; under the function requirement, the miner

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2) and thus established a change in applicable condition of entitlement at 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 20-23.

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

must have been employed in the extraction or preparation of coal.[5] *Krushansky*, 923 F.2d at 41, 14 BLR at 2-143.

Claimant testified that as a heavy equipment operator, he hauled processed coal from the tipple to the stockpile, and used a dozer to push the coal into the stockpile. Hearing Transcript at 14, 26-27, 30-33. When the coal company received an order, he would "load the coal back out" by "let[ting] the belt line back down and push[ing] it back in the hopper," and "put[ting] it back through to the railroad cars." *Id*. at 25-26. The coal company owned the coal he moved and the stockpile consisted of coal ready for sale. *Id*. at 31-33. The administrative law judge noted that because employer conceded that all of claimant's coal mine employment met the situs test, the issue before him was whether claimant's duties as a heavy equipment operator met the function test. Decision and Order at 6. Relying on claimant's testimony, he found claimant's duties moving the coal from the tipple to stockpiles, piling the coal into stockpiles, and moving the coal out of the stockpiles fall within the regulatory definition of coal preparation. Decision and Order at 7, *citing* 20 C.F.R. § 725.101(a)(13). He therefore determined the coal claimant encountered was still in the preparation stage when he moved the coal to and from the stockpiles and loaded it into railroad cars to be delivered to customers. *Id*. When claimant's ten to twelve years as a heavy equipment operator is combined with his other mining work, the administrative law judge found he had more than fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.

Employer initially alleges the administrative law judge erred in determining claimant's ten to twelve years as a heavy equipment operator satisfied the function requirement. Employer maintains that because the tipple marks the boundary between coal preparation and the stream of commerce, working with coal that had passed through the tipple was not integral to the extraction or preparation of coal. Employer's Brief at 6, *citing Collins*, 795 F.2d at 372-73 ("Traditionally the tipple marks the demarcation point between the mining and the marketing of coal. . . . When coal leaves the tipple, extraction and preparation are complete and it is entering the stream of commerce."); *Eplion*, 794 F.2d at 937. Under the facts of this case, we disagree with employer's conclusion.

[5] Employer agrees claimant's employment meets the situs requirement, as he worked for approximately twenty-four years aboveground at an underground mine. Employer's Brief at 3-4, 5. Because claimant worked aboveground at an underground mine, he was not required to establish that he worked in conditions substantially similar to those in an underground mine. 20 C.F.R. §718.305(b)(1)(i), (2); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011); *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497, 1-503-504 (1979).

The regulation at 20 C.F.R. §725.101(a)(13) defines coal preparation as "the breaking, crushing, sizing, cleaning, washing, drying, mixing, *storing and loading* of bituminous coal, lignite or anthracite, and such other work of preparing coal as is usually done by the operator of a coal mine." 20 C.F.R §725.101(a)(13) (emphasis added). The administrative law judge properly found claimant's duties constituted coal preparation, as they are explicitly set forth in the regulatory definition. *Id*.; Decision and Order at 7. In addition, the administrative law judge rationally determined the fact that the coal had passed through the tipple was of no significance because the coal preparation process was not complete until claimant loaded the coal into the railroad cars.[6] *See Norfolk & Western Ry. Co. v. Director, OWCP* [*Shrader*], 5 F.3d 777, 780 (4th Cir. 1993) (the process of loading coal is part of coal preparation); *Norfolk & Western Ry. Co. v. Roberson*, 918 F.2d 1144, 1150 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 2012 (1991) (a railroad employee would not meet the function test *after* the coal is prepared and loaded into railcars); Decision and Order at 7.

Employer next argues the administrative law judge "cherry picked the facts from claimant's testimony," and did not adequately explain his findings. Employer's Brief at 7. Because employer does not describe how the administrative law judge's citations to claimant's testimony constituted "cherry picking," we reject this allegation. *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). A review of the Decision and Order establishes the administrative law judge set forth his findings in detail, adequately identifying the underlying rationale and citing relevant regulations and case law in support. *See* Decision and Order at 3-7. Thus, contrary to employer's contention, he complied with the Administrative Procedure Act.[7] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[6] Employer argues "it is reasonable to assume" that the coal claimant handled "had already been sold to the consumer," thus placing it in the stream of commerce and precluding a finding his work was integral to the coal preparation process. Employer's Brief at 4. However, it cites nothing in the record to refute claimant's testimony that the coal he added to the stockpile, prior to loading it into railroad cars, was owned by employer. *Id*.; *see* Hearing Transcript at 30-31. Nor does it cite any evidence that ownership of the coal actually transferred prior to loading. Moreover, the administrative law judge properly found that loading coal from the operator's mine site into railroad cars was the last step in the preparation process. *See Norfolk & Western Ry. Co. v. Director, OWCP* [*Shrader*], 5 F.3d 777, 780 (4th Cir. 1993). Thus, we reject employer's argument.

[7] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions

We therefore affirm the administrative law judge's finding claimant's job as a heavy equipment operator constituted the work of a miner. We further affirm his determination claimant established more than fifteen years of qualifying coal mine employment and thus invoked the Section 411(c)(4) presumption.

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

Once claimant invokes the Section 411(c)(4) presumption, the burden shifts to employer to establish claimant has neither legal nor clinical pneumoconiosis,[8] or "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.

Legal Pneumoconiosis

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). The administrative law judge considered the opinions of Drs. Cordasco and Green that claimant has legal pneumoconiosis, and the contrary opinions of Drs. McSharry and Sargent. Decision and Order at 26-27; Director's Exhibits 14, 17; Claimant's Exhibits 1-2; Employer's Exhibits 1, 8-9. He accorded "great weight" to the opinions of Drs. Cordasco, Green and Sargent, but discredited Dr. McSharry's opinion because he relied on the absence of clinical pneumoconiosis on x-ray to exclude legal pneumoconiosis, and did not fully explain his diagnoses. Decision and Order at 26-27. The administrative law judge concluded "the weight of the medical opinion

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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).

[8] "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 is defined as "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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1).

evidence establishes the existence of legal pneumoconiosis; therefore, [e]mployer has not established the absence of legal pneumoconiosis." *Id*. at 27.

Employer contends the administrative law judge erred in discrediting Dr. McSharry's opinion because he relied on negative x-ray evidence to determine claimant does not have legal pneumoconiosis. Employer's Brief at 8. Employer further asserts that absent this error, "the medical evidence is at least in equipoise," as there would be two fully credited opinions diagnosing legal pneumoconiosis[9] and two fully credited opinions excluding its presence. *Id*. at 9. In making this assertion, employer has conceded it cannot satisfy its burden on rebuttal, as evidence that is in equipoise on legal pneumoconiosis is insufficient to affirmatively disprove the disease. 20 C.F.R. §718.305(d)(1)(i)(A); *see Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995). Accordingly, we affirm the administrative law judge's finding employer did not rebut legal pneumoconiosis and, therefore, did not rebut the presumed existence of pneumoconiosis.[10] 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 27.

Disability Causation

The administrative law judge next found employer failed to establish that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 27-28. Employer argues the administrative law judge erred in finding the opinions of Drs. McSharry and Sargent insufficient to rebut disability causation. Employer's Brief at 10. We disagree. It was within the administrative law judge's discretion to discount their opinions because neither physician diagnosed legal pneumoconiosis, contrary to his determination employer did not disprove the existence of the disease.[11] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 115-16 (4th Cir. 1995) (where physician

[9] We affirm, as unchallenged by employer on appeal, the administrative law judge's crediting of the opinions of Drs. Cordasco and Green. *See Skrack*, 6 BLR at 1-711; Decision and Order at 27.

[10] Based on this disposition, we decline to reach employer's challenge to the weighing of Dr. McSharry's opinion. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988).

[11] Neither Dr. McSharry nor Dr. Sargent offered an opinion on disability causation independent of the belief claimant does not have legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Director's Exhibit 17; Employer's Exhibits 8, 9.

failed to properly diagnose pneumoconiosis, an administrative law judge "may not credit" that physician's opinion on causation absent "specific and persuasive reasons," in which case the opinion is entitled to at most "little weight"); Decision and Order at 28.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge