U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 17-0133 BLA

CLINTON C. RATLIFF	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	DATE ISSUED: 12/20/2017
	)	
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 William S. Colwell, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

Rita Roppolo (Nicholas C. Geale, Acting 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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-05926) of Administrative Law Judge William S. Colwell, rendered on a claim filed on May 5, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge determined that claimant established at least sixteen years of coal mine employment, with all of it occurring either underground or above ground at underground mine sites. The administrative law judge also found that claimant established that he has a totally disabling respiratory or pulmonary impairment, thereby invoking the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found that employer did not rebut the presumption and awarded benefits.

On appeal, employer argues that the administrative law judge erred in determining that claimant established at least sixteen years of qualifying coal mine employment and, therefore, erred in determining that claimant invoked the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erroneously found that it did not rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, filed a limited brief, contending that the Board should affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption. Employer filed a reply brief, reiterating its contentions.

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.[1] 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).

[1] Claimant's last coal mine employment was in Virginia. Director's Exhibits 3, 6. Accordingly, the Board will apply the law 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).

I. Invocation of the Presumption – Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, claimant must prove that he has a totally disabling respiratory or pulmonary impairment[2] and that he worked for at least fifteen years "in one or more underground coal mines," or "in a coal mine other than an underground mine" in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i), (iii). Pursuant to 20 C.F.R. §718.305(b)(2), "[t]he 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."

In this case, the administrative law judge credited claimant with sixteen years of coal mine employment. Decision and Order at 4. When considering whether this employment qualified to invoke the Section 411(c)(4) presumption, the administrative law judge relied on claimant's unequivocal testimony at the May 29, 2014 hearing that he worked aboveground as an electrician at four underground mines. Decision and Order at 7; Hearing Transcript at 24-26. Relying on the Board's decisions in *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011) and *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497, 1-501 (1979) (Smith, Chairman, dissenting), the administrative law judge found that because claimant was employed at the site of an underground mine, he was not required to show comparability of conditions in order to invoke the Section 411(c)(4) presumption. Decision and Order at 7. Thus, the administrative law judge found that claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. *Id*. at 8.

Employer argues that the administrative law judge erred by failing to consider whether claimant's aboveground work at underground mine sites was in conditions substantially similar to those in an underground mine. Employer also contends that the administrative law judge did not adequately explain how the evidence was sufficient to establish that all of claimant's jobs took place aboveground at underground mine sites.

Employer's arguments are based on an erroneous standard for determining whether claimant's work constituted qualifying coal mine employment for purposes of Section 411(c)(4). In distinguishing between "an underground mine" and a "mine other

[2] We affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), as employer concedes on appeal that "the evidence establishes that the claimant would be considered totally disabled from a respiratory standpoint." Employer's Brief in Support of Petition for Review at 9; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14.

than an underground mine," the language of Section 411(c)(4), as implemented by 20 C.F.R. §718.305(b), makes clear that it is the *type* of mine (underground or surface), rather than the location of the particular worker (surface or below the ground), that determines whether a miner is required to show comparability of conditions. *Muncy*, 25 BLR 1-21, 1-28-29. The administrative law judge thus properly determined that coal mine work at the site of an underground mine, whether performed above or below ground, is not subject to the requirement that claimant establish substantial similarity of conditions. *See Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058, 25 BLR 2-453, 2-468 (6th Cir. 2013); *Kanawha Coal Co. v. Director, OWCP* [*Kuhn*], 539 F. App'x 215, 218 (4th Cir. 2013) (because claimant's "above ground work . . . was carried out at an underground mine site," it constituted "qualifying employment for purposes of the fifteen-year presumption"); *Muncy*, 25 BLR at 1-21; *Alexander*, 2 BLR at 1-501; Decision and Order at 7.

Further, the uncontradicted evidence demonstrates that all of the mines where claimant worked were underground. Director's Exhibit 3; Hearing Transcript at 25-26. The administrative law judge thus was not required, contrary to employer's contention, to separately analyze each of the miner's individual aboveground duties for substantial similarity, given the broad statutory definition of "coal mine":

> [A]n area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

30 U.S.C. §802(h)(2), as implemented by 20 C.F.R. §725.101(a)(12); *see also Ramage*, 737 F.3d at 1058-1059 (given congressional definition of "coal mine," "no showing of comparability of conditions is necessary for an aboveground employee at an underground coal mine."). Accordingly, we affirm the administrative law judge's finding that claimant worked for at least fifteen years aboveground at underground mine sites, thereby invoking the Section 411(c)(4) presumption, as it was within his discretion and supported by substantial evidence. 20 C.F.R. §718.305(b)(1)(i); *see Muncy*, 25 BLR at 1-21; *Alexander*, 2 BLR at 1-501; Decision and Order at 7-8.

II. Rebuttal of the Presumption

After 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

clinical pneumoconiosis,[3] or by establishing that "no part of the miner's 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 W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015); Minich v. Keystone Coal Mining Corp., 25 BLR 1-149, 1-154-46 (2015) (Boggs, J., concurring and dissenting).

A. Legal Pneumoconiosis

In considering whether employer rebutted the presumed existence of legal pneumoconiosis, the administrative law judge weighed the medical opinion of Dr. Gallai, who diagnosed legal pneumoconiosis, and the contrary opinions of Drs. Fino and Castle. Decision and Order at 19-26. Employer asserts that the administrative law judge erred in rejecting the opinions of Drs. Fino and Castle as unreasoned because, contrary to the administrative law judge's findings, they did not rely on generalities or premises inconsistent with the regulations. Rather, employer asserts that Drs. Fino and Castle clearly explained why they eliminated coal dust as a cause of claimant's respiratory impairment. Employer's contentions are without merit.

Both Dr. Fino and Dr. Castle indicated that claimant's decreased FEV1/FVC ratio was inconsistent with a coal dust-induced respiratory impairment. Director's Exhibit 11; Employer's Exhibit 3. As the administrative law judge permissibly found, this viewpoint is contrary to the statement by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions that "coal dust can cause clinically significant obstructive disease in the absence of clinical pneumoconiosis, as shown by the reduced FEV1/FVC ratio." Decision and Order at 24, *quoting* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see Westmoreland Coal Co. v. Stallard*, F.3d , No. 16-1460, 2017 WL 5769516 at 5-6 (4th Cir. Nov. 29, 2017); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313, 25 BLR 2-115, 2-129-30 (4th Cir. 2012). Furthermore, the administrative law judge rationally found that neither Dr. Fino nor Dr. Castle adequately explained why coal mine dust exposure could not have also contributed to claimant's respiratory condition,

[3] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease 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).

even if claimant's significant smoking history was the primary cause.[4] *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); Decision and Order at 24-25. Thus, we affirm the administrative law judge's finding that employer did not rebut the presumed existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A).[5]

B. Total Disability Due to Legal Pneumoconiosis

After finding that employer was unable to disprove the existence of legal pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that no part of claimant's total respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 28. The administrative law judge permissibly discounted the opinions of Drs. Fino and Castle that claimant's disabling respiratory or pulmonary impairment was not caused by pneumoconiosis because neither physician diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove that claimant has the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 28. The administrative law judge therefore properly

[4] Employer argues that the administrative law judge did not adequately explain why he credited claimant with a forty pack-year smoking history given the conflicting evidence in the record. However, remand is not required for reconsideration of this issue. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). The extent of claimant's smoking history was not the basis for the administrative law judge's discrediting of Drs. Fino and Castle. Rather, the administrative law judge determined that their opinions are insufficient to rebut the presumed existence of legal pneumoconiosis because they did not adequately explain why coal dust exposure could not be a cause of claimant's respiratory impairment, in addition to smoking. Decision and Order at 23-25.

[5] Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Fino and Castle, we need not address employer's remaining arguments regarding the weight he accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Additionally, in light of employer's failure to rebut the presumed existence of legal pneumoconiosis, we need not address employer's arguments concerning rebuttal of the presumed existence of clinical pneumoconiosis, as the party opposing entitlement must establish that claimant does not have legal pneumoconiosis *and* clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

found that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 28. We therefore affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by either method.

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

JONATHAN ROLFE
Administrative Appeals Judge