U.S. Department of Labor

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

BRB No. 17-0135 BLA

FRANKIE M. HAMMONDS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PREMIER ELKHORN COAL COMPANY c/o GATLIFF COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 12/11/2017
WELLS FARGO DISABILITY MANAGEMENT	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Ann Marie Scarpino (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 (2014-BLA-05044) of Administrative Law Judge Joseph E. Kane rendered on a subsequent claim filed on November 19, 2012,[1] 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 credited claimant with at least thirty-two years of surface coal mine employment, as stipulated by the parties, and found that at least fifteen years of claimant's surface coal mine employment took place in conditions substantially similar to those in an underground mine. The administrative law judge also found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act.[2] Finding that employer did not rebut the presumption, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in crediting claimant with at least fifteen years of qualifying coal mine employment, and thus erred in

[1] The current claim is claimant's third. Claimant's most recent prior claim, filed on May 4, 2010, was denied by the district director on June 9, 2011, for failure to establish pneumoconiosis or total disability from a respiratory or pulmonary impairment. Decision and Order at 2, 20; Director's Exhibit 1. Claimant took no further action and the denial became final. *Id.*

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where claimant establishes fifteen or more years of underground coal mine employment, or surface 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), as implemented by 20 C.F.R. §718.305(b).

finding that he invoked the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in his determination of the commencement date for benefits. Claimant responds, urging affirmance of the award of benefits and the commencement date. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response to employer's argument that the regulations do not provide guidance for determining whether the conditions in claimant's surface mine employment were substantially similar to those in an underground mine.

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.[3] 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

Employer contends that the administrative law judge erred in finding that at least fifteen years of claimant's thirty-two years of surface coal mine employment was in conditions substantially similar to those in an underground mine. Employer argues that the regulations do not provide any guidance regarding the level, duration, or frequency of coal dust exposure required to establish that a miner's surface coal mine dust exposure was substantially similar to exposure in an underground mine. Therefore, employer asserts, the administrative law judge "is not equipped by training OR practice to make, what is tantamount to, a scientific decision." Employer's Brief at 12 (emphasis in original). Employer further asserts that the evidence in this case does not support a finding of substantial similarity and that the administrative law judge failed to distinguish between claimant's exposure to coal dust and his exposure to dirt. Employer's Brief at 18. Employer's contentions lack merit.

To invoke the Section 411(c)(4) presumption, claimant must establish at least fifteen years of "employment in one or more underground coal mines," or "employment in a coal mine other than an underground mine," in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4) (2012); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). Section 411(c)(4) does not define the term "substantially similar." Contrary to employer's contention, however, as the Director

[3] The record reflects that claimant's last coal mine employment was in Kentucky. Decision and Order at 4; Director's Exhibit 1 at 281. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

asserts, the implementing regulation at 20 C.F.R. §718.305(b)(2) provides that "[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." 20 C.F.R. §718.305(b)(2); *see* Director's Response at 1 n.1. Thus, we reject employer's argument that claimant was required to provide evidence establishing that the level, duration, and frequency of his dust exposure in his surface coal mine employment "medically constitutes equivalent coal dust exposure to working in underground coal mining to invoke [the Section 411(c)(4) presumption]." Employer's Brief at 12-13.

Moreover, exposure to any kind of coal mine dust, in sufficient quantity, may constitute qualifying coal mine employment, *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 25 BLR 2-725 (6th Cir. 2015); *Garrett v. Cowin & Co., Inc.*, 16 BLR 1-77 (1990), as the definition of coal mine dust is not limited to dust that is generated during the extraction or preparation of coal, but encompasses "the various dusts around a coal mine." *Pershina v. Consolidation Coal Co.*, 14 BLR 1-55, 1-57 (1990). Contrary to employer's assertion, therefore, the administrative law judge was not required to determine whether claimant was exposed to "coal dust" specifically, as opposed to "coal-mine dust" including dust from the road and from drilling through rock. *Id.*; Employer's Brief at 12.

We also reject employer's argument that the administrative law judge erred in finding that claimant established at least fifteen years of qualifying coal mine employment, based on his testimony. Employer's Brief at 12-13. First, the record does not reflect that the administrative law judge mistakenly believed that claimant worked solely as a driller, as employer asserts. Employer's Brief at 12. Rather, the administrative law judge considered claimant's testimony that he performed other jobs as well:

> [Claimant] explained that he operated a drill for 9 years, which was very dusty and required him to shovel dirt and dust from around the drilled hole. He explained how dust would blow out of the hole as he was drilling through limestone and sandstone. In addition, the [c]laimant did mechanical work in and around the tipple, and he had to use a water truck, grader, and sweeper on the road leading to the tipple, which was caked with as much as one to two inches of dust.

Decision and Order at 5, referencing Hearing Tr. at 20-21, 24-28. The administrative law judge noted that claimant testified that his drilling work was very dusty, that his work driving and maintaining the coal trucks was also dusty depending on the weather, that operating the heavy equipment generated a lot of dust, and that he was exposed to dust everywhere in the surface mine. Decision and Order at 3-4, 5; Hearing Tr. at 18, 24-25,

26, 28. Finding that claimant was a credible witness, the administrative law judge rationally relied on claimant's "significant testimony" to conclude that claimant provided "ample evidence that his surface mine employment was as dusty as the conditions prevailing in an underground mine." Decision and Order at 3, 5; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Kuchawara v. Director, OWCP*, 7 BLR 1-167 (1984). Consequently, we affirm 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. *See* 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b)(2); *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988); Decision and Order at 5.

We further affirm, as unchallenged, the administrative law judge's finding that claimant has a totally disabling respiratory impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 20. Therefore we affirm the administrative law judge's findings that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and invoked the Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis. Decision and Order at 17-20, 27, 28. Because employer does not challenge the administrative law judge's determination that it did not rebut the presumption, pursuant to 20 C.F.R. §718.305(d)(1)(i), (ii), those findings are also affirmed. *See Skrack*, 6 BLR at 1-711; Decision and Order at 22-27. Thus, we affirm the administrative law judge's conclusion that claimant established entitlement to benefits.

Date for Commencement of Benefits

Once entitlement to benefits is established, the date for their commencement is determined by the month in which claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). In a subsequent claim, the date for the commencement of benefits is determined pursuant to 20 C.F.R. §725.503, with the additional rule that no benefits may be paid for any time period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

The administrative law judge found that the record does not contain medical evidence establishing when claimant became totally disabled due to pneumoconiosis and, therefore, awarded benefits beginning November 2012, the month in which the subsequent claim was filed. Decision and Order at 28. Employer challenges that determination, asserting that "[t]he medical evidence accepted in this subsequent claim first finds pulmonary disability from [coal workers' pneumoconiosis] on December 12, 2013." Employer's Brief at 14. We disagree.

Employer does not identify which item of evidence dated December 12, 2013 it relies on. Dr. Trice opined that claimant is totally disabled due to pneumoconiosis in a report dated December 12, 2013. Claimant's Exhibit 1. Dr. Trice's opinion does not indicate when total disability began, however. Moreover, contrary to employer's argument, the first evidence of disability does not establish the onset date, but merely indicates that claimant became totally disabled at some point prior to that date. *Owens*, 14 BLR at 1-50. Dr. Trice's report therefore does not establish the onset date in this claim. As substantial evidence supports the administrative law judge's finding that the medical evidence does not reflect the date upon which claimant became totally disabled due to pneumoconiosis, we affirm the determination that benefits are payable from November 2012, the month in which claimant filed his subsequent claim.[4] 20 C.F.R. §725.503(b); *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

[4] Moreover, in finding claimant totally disabled due to pneumoconiosis, the administrative law judge credited the medical opinions of Drs. Trice and Green, dated December 12, 2013 and October 1, 2015, and discredited the medical opinions of Drs. Broudy, Gallai, and Vuskovich, dating from January 25, 2013 to December 9, 2015. *See* Decision and Order at 7-12, 19-20; Director's Exhibit 11; Claimant's Exhibits 1, 3; Employer's Exhibits 3-6, 12, 13, 18. Thus, the administrative law judge did not credit any evidence that claimant was *not* totally disabled due to pneumoconiosis at any time subsequent to the filing date of this claim.

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