U.S. Department of Labor

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

BRB No. 16-0108 BLA

SUSAN McLEAN (o/b/o of BRADFORD McLEAN, deceased)	)	
Claimant-Respondent	)	
v.	)	
SPRING CREEK COAL COMPANY	)	
	)	DATE ISSUED: 02/16/2017
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 of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Jared L. Bramwell (Kelly & Bramwell, P.C.), Draper, Utah, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Helen H. Cox (Maia Fisher, Associate Solicitor of Labor; 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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (11-BLA-6187) of Administrative Law Judge William S. Colwell awarding benefits 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 September 7, 2010.

The administrative law judge initially credited the miner with at least twenty-eight years of coal mine employment.[1] Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge further found that at least fifteen of the miner's twenty-eight years of coal mine employment were qualifying. The administrative law judge also found, as the parties stipulated, that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that the miner invoked the rebuttable presumption set forth at Section 411(c)(4). The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the miner established at least fifteen years of qualifying coal mine employment and, therefore, erred in finding that the miner invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer did not rebut the presumption. Claimant[3] responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response in support of the administrative law judge's

[1] The record reflects that the miner's last coal mine employment was in Montana. Director's Exhibits 3, 6, 7. Accordingly, the Board will apply the law of the United States Court of Appeals for the Ninth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] If a miner has fifteen or more years of underground or substantially similar coal mine employment and establishes that he has a totally disabling respiratory or pulmonary impairment, Section 411(c)(4) provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] The miner died on June 11, 2011. Director's Exhibit 42. Claimant, the miner's surviving spouse, is pursuing the miner's claim.

finding that the miner had at least fifteen years of qualifying coal mine employment. In a reply brief, employer reiterates its previous contentions.[4]

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. 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

Employer initially argues that the administrative law judge erred in determining that the miner had sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption. To invoke the presumption, claimant must establish that the miner had at least fifteen years of "employment in one or more underground coal mines," or coal mine employment 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." 20 C.F.R. §718.305(b)(2).

In this case, the miner died before the hearing. Claimant, therefore, relied upon Dr. Gottschall's report, her testimony, and her son's testimony to establish that the miner was regularly exposed to coal-mine dust. Dr. Gottschall, the physician who performed the Department of Labor-sponsored examination, obtained an occupational history from the miner. Dr. Gottschall detailed the miner's coal dust exposure while he worked for employer:

> At Spring Creek Coal Mine, from July 1986 until March 2006, [the miner] did both set-up as well as drilling, and was exposed to coal[-]mine dust from open pit coal mines. He was seated in a cab when operating the drill. There was a dust collector attached to the machine which worked well until the wind blew, which was often, creating lots of dust around the drill at all times.

Director's Exhibit 12.

[4] Because employer does not challenge the administrative law judge's finding that the miner established twenty-eight years of coal mine employment, or his finding that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

At the hearing, claimant testified regarding her husband's appearance when he came home from work: "He was very, very - - his face would be all dark and, you know, dirty. And he was just dirty all over." Hearing Transcript at 23. Claimant further testified that when the miner blew his nose into a tissue, it was dark in color. *Id.* at 24.

The miner's son, Matthew McLean, also provided testimony regarding his father's appearance when he came home from work:

> He was dirty. There was - - his face, his ears, inside his ears, his hands, there was nothing - - not a spot on him that seemed clean. Even his clothes would be dirty, although the coal company gave him a coverall to wear and he left those at his locker at work, he still came home and his clothes were still dirty. He would just like, you know, my mom said, he would blow his nose and it would - - even days after he was working, you know, a couple days off, he'd still blow his nose and the tissue would still be black, from dust.

Hearing Transcript at 33-34. Matthew McLean visited his father at work during "family days," testifying that when he "crawl[ed] up on a piece of equipment," his hands would become "black from the dust and dirt on it." *Id.* at 34.

Matthew McLean also testified regarding conversations he had with his father regarding his work conditions:

> [H]e always wanted to have his machine cleaned, especially the cabin in the machine, he was meticulous about that. That was his work environment and that's where he wanted . . . it to be clean. He would talk about getting it clean and then within an hour or two having a light coating of dust all over his instrument panel. His response to me, or his talking to me about it was the cabin filter, that they had on the machine, it could filter all it wanted, but there were so many cracks and leaks in the doors and windows, that let the dust in, that it just wasn't able to do its job. So, he was constantly cleaning the inside of his cab, making it a pleasant environment for him to work in.

Hearing Transcript at 37.

Employer submitted scientific and technical evidence in support of its position that the miner's work at its surface mine was not substantially similar to underground mining. The administrative law judge accurately summarized this evidence as follows:

> Employer provided a report from A.J. Tomer, Manager of Occupational Health at Cloud Peak Energy. (EX 8). Mr. Tomer and Mr. Kean Johnson, H&S Manager at Spring Creek Coal Company searched for records concerning [the miner's] employment at Spring Creek Coal Company. Mr. Tomer provided reports of samples of dust to show dust exposure from Spring Creek Mine as well as stated that he is familiar with the type of equipment that [the miner] used for work, as he operated a Drilltech drill for one year. Employer also provided a report by Drew Van Orden, Senior Consulting Scientist/RJ Lee Group, who reviewed airborne dust levels in western coal mines from 1986 to 2006, which included Spring Creek Coal Mine. (EX 10). The report concluded that there is a significant difference in the amount of airborne dust in coal mines in the West as compared to underground mines, which have much higher dust levels than surface mines.

Decision and Order at 7.

After consideration of the all of the evidence, the administrative law judge found that claimant established that the miner worked at least fifteen years for employer at a surface mine in conditions that were substantially similar to conditions in an underground mine:

> Even though [the miner] worked inside a cab with an attached dust collector, he was regularly exposed to coal dust when he worked for [employer]. Furthermore, [the miner's] wife's and son's testimony of his daily appearance after work suggests [the miner] was regularly exposed to dust. The evidence [e]mployer provided is insufficient to show that [the miner] was not regularly exposed to coal mine dust. Mr. Tomer and Mr. Van Orden's reports consider only coal dust exposure at certain times, and cannot account for daily exposure to coal mine dust at Spring Creek Coal Mine from 1986 to 2006.

Decision and Order at 7. The administrative law judge, therefore, credited the miner with at least fifteen years of qualifying coal mine employment. *Id.*

Employer contends that the administrative law judge erred in crediting the miner with at least fifteen years of qualifying coal mine employment. Employer initially contends that the administrative law judge applied an incorrect standard. Employer's Brief at 15. We disagree. The administrative law judge applied the correct standard, requiring claimant to establish that the miner's surface coal mine employment regularly exposed him to coal-mine dust. *See* 20 C.F.R. §718.305(b)(2); *Antelope Coal Co./Rio*

Tinto Energy Am. v. Goodin, 743 F.3d 1331, 1343-44, 25 BLR 2-549, 2-564-66 (10th Cir. 2014) (holding that "substantial similarity" is proved if claimant proves that the miner was regularly exposed to coal-mine dust).

Employer also contends that the administrative law judge erred in finding the evidence established that the miner was regularly exposed to coal-mine dust while working at his surface coal mine employment. We disagree. The administrative law judge credited the testimonial evidence regarding the miner's coal mine[-]dust exposure, and found it sufficient to establish that the miner was regularly exposed to coal-mine dust for at least fifteen of the twenty-eight years that he worked in surface coal mine employment. Decision and Order at 7. Conversely, the administrative law judge found that employer's scientific and technical evidence was too sporadic, both in time and in location, to establish that the miner was not regularly exposed to coal-mine dust while working at the surface mines.[5] *Id.* It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). Because it is based upon substantial evidence, we affirm the administrative law judge's finding that claimant established that the miner was regularly exposed to coal-mine dust during his surface coal mine employment. Consequently, we affirm the administrative law judge's finding that claimant established that the miner had at least fifteen years of qualifying coal mine employment.

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

Because the administrative law judge found that the miner invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to

[5] As the Director, Office of Workers' Compensation Programs, notes, employer's "evidence of random dust samplings at the Spring Creek site (205 samples over 22 years of which only 23 were taken at a drilling position) that showed dust levels at the surface mine below the underground dust levels does not contradict Matthew McLean's testimony that his father regularly worked in dusty conditions." Director's Brief at 5.

employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,[6] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's 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)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer contends that the administrative law judge erred in finding that it failed to establish that the miner did not have legal pneumoconiosis.[7] In evaluating whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Farney and Tuteur. Dr. Farney diagnosed emphysema due to cigarette smoking, Employer's Exhibits, 4, 12, while Dr. Tuteur diagnosed chronic obstructive pulmonary disease (COPD) due to cigarette smoking. Employer's Exhibits 3, 6, 8. Drs. Farney and Tuteur each opined that the miner did not suffer from legal pneumoconiosis. Employer's Exhibits 3, 4, 6, 8, 12. The administrative law judge discredited the opinions of Drs. Farney and Tuteur because he found that the doctors failed to adequately explain how they eliminated the miner's twenty-eight years of coal-mine dust exposure as "a contributing or aggravating factor" to his disabling obstructive pulmonary impairment. Decision and Order at 17.

We reject employer's contention that the administrative law judge erred in his consideration of the opinions of Drs. Farney and Tuteur. The administrative law judge permissibly questioned the opinions of Drs. Farney and Tuteur because he found that the physicians failed to adequately explain how they eliminated the miner's twenty-eight years of coal-mine dust exposure as a source of his disabling obstructive pulmonary impairment.[8] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-

[6] "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).

[7] The administrative law judge found that employer established that the miner did not suffer from clinical pneumoconiosis. Decision and Order at 19.

[8] The administrative law judge found that while Drs. Farney and Tuteur explained why they believed that smoking was the primary, or only, cause of the miner's disabling pulmonary impairment, neither physician adequately explained why the miner's coal-

14, 25 BLR 2-115, 2-128 (4th Cir. 2012); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-740 (6th Cir. 2015); Decision and Order at 17. Because the regulations defining pneumoconiosis provide that legal pneumoconiosis encompasses respiratory and pulmonary diseases and impairments significantly related to, or substantially aggravated by, dust exposure in a coal mine, it was within the discretion of the administrative law judge to determine whether the doctors adequately addressed whether coal mine dust had substantially aggravated the miner's respiratory or pulmonary impairment. The administrative law judge, therefore, acted within his discretion in discounting the opinions of Drs. Farney and Tuteur.[9] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Because the administrative law judge permissibly discredited the opinions of Drs. Farney and Tuteur, the only opinions supportive of a finding that the miner did not suffer from legal pneumoconiosis, we affirm his finding that employer failed to establish that the miner did not have legal pneumoconiosis. Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner did not have pneumoconiosis.[10] *See* 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge also considered whether employer rebutted the Section 411(c)(4) presumption by establishing that "no part of the miner's 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)(ii). The administrative law judge rationally discounted the opinions of Drs. Farney and Tuteur that the miner's disability was not due to pneumoconiosis because neither doctor diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of

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mine dust exposure was not "a contributing or aggravating factor." Decision and Order at 17.

[9] Because the administrative law judge provided valid reasons for according less weight to the opinions of Drs. Farney and Tuteur, the administrative law judge's error, if any, in according less weight to their opinions for other reasons, constitutes harmless error. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Farney and Tuteur.

[10] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

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); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013). As the administrative law judge permissibly discounted the opinions of Drs. Farney and Tuteur, we affirm the administrative law judge's determination that employer failed to prove that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis, and affirm the award of benefits. *See* 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge