U.S. Department of Labor

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

BRB No. 19-0133 BLA

BOB JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TRAVELLERS COAL CORPORATION	)	
	)	
and	)	
	)	
TRAVELLERS INDEMNITY COMPANY	)	DATE ISSUED: 02/11/2020
	)	
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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

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

Alyssa George (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, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-06021) of Administrative Law Judge Steven D. Bell on a claim filed 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 September 22, 2015.[1]

The administrative law judge credited claimant with 20.6 years of underground coal mine employment[2] and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2012), and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). He further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding at least fifteen years of coal mine employment and in invoking the Section 411(c)(4) presumption. Employer also argues he erred in finding the presumption unrebutted.[4] Claimant has not filed a response. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the award of benefits.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational,

[1] On January 23, 2013, the district director finally denied claimant's previous claim, filed on May 17, 2012, for failure to establish any element of entitlement. Director's Exhibit 1.

[2] Claimant's coal mine employment occurred in Kentucky. Hearing Transcript at 9. Accordingly, this case arises within the jurisdiction 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).

[3] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established total disability and a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 725.309; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 22.

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, 362 (1965).

After consideration of the administrative law judge's Decision and Order Awarding Benefits, the arguments raised on appeal, and the evidence of record, we conclude that the award of benefits is supported by substantial evidence and contains no reversible error. Based on claimant's hearing testimony, employment history forms, and earnings records, the administrative law judge credited claimant with: 15.58 years of coal mine employment with Kentucky Elkhorn Coal from 1969 to 1986; 4.2 years of coal mine employment with Travellers Coal from 1987 to 1991; 0.41 of a year with Oakwood Mining and 0.07 of a year with CD Enterprises in 1993; and 0.33 of a year with Manatee Coal in 1994. Decision and Order at 5-6.

As the Director points out, claimant's quarterly Social Security Administration records establish that claimant worked continuously for Kentucky Elkhorn Mining/Kentucky Elkhorn Coal (Kentucky Elkhorn) for six full years from 1972 through 1977, with quarterly earnings well above $50 per quarter. Director's Brief at 3. He continued to work for Kentucky Elkhorn from 1978 through 1986. *Id*. The administrative law judge noted that claimant's earnings divided by the average daily earnings of a miner exceeded 125 working days for each year from 1978 through 1982 and for 1985, entitling claimant to six additional years of coal mine employment. Decision and Order at 5-6. Counting claimant's three full years of employment with employer (1988 through 1990), applying Sixth Circuit precedent, claimant thus had fifteen years of coal mine employment before consideration of any of the partial years he worked.[5] *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401-402 (6th Cir. 2019); *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); Employer's Brief at 14-15.

Employer asserts the record establishes "no more than 9.82 years" of coal mine employment. Employer's Brief at 16. But employer fails to identify any specific error the administrative law judge made in calculating claimant's years of coal mine employment.[6] *Id*. at 14-16. Because the Board must limit its review to contentions of error

[5] *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402-05 (6th Cir. 2019) (if the record establishes at least 125 working days, the miner can be credited with a year of coal mine employment, regardless of the actual duration of employment for the year).

[6] Employer asserts the administrative law judge erred by not excluding "the earnings for years where [claimant] worked less than 125 days" in a calendar year. Employer's Brief at 14-16. Employer does not specify what years it is referring to in making this argument. Further, the Sixth Circuit has explained that "if the beginning and ending dates of a miner's employment . . . can be determined" and "the miner was employed . . . for one

the parties specifically raise and employer has not raised any regarding the administrative law judge's calculation, we affirm the finding that claimant established 20.6 years of coal mine employment. *See Shepherd*, 915 F.3d at 404-07; 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Further, we affirm as unchallenged the finding that all of claimant's coal mine employment was in underground coal mines. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7. Therefore, as employer does not challenge the administrative law judge's determination that claimant was totally disabled by a respiratory or pulmonary impairment, *see* n.4 *supra*, we affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption.

With respect to rebuttal of the presumption,[7] we affirm as unchallenged the administrative law judge's finding that employer failed to disprove clinical pneumoconiosis.[8] *See Skrack*, 6 BLR at 1-711; Decision and Order at 28.

Although employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis, we will address the issue of legal pneumoconiosis[9] because it is relevant to the second method of rebuttal. 20 C.F.R.

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calendar year or partial periods totaling [one year], it will be presumed, absent evidence to the contrary, that the miner worked in or around the mines for at least 125 days." *Shepherd*, 915 F.3d at 404, *citing* 20 C.F.R. § 725.101(a)(32)(ii). Therefore in "many cases, simply being in the employ of a mining company for a calendar year is sufficient to qualify the miner for one year of coal mine employment." *Id*. Employer identifies no contrary evidence the administrative law judge failed to consider.

[7] Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish he has neither legal nor clinical pneumoconiosis or that "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).

[8] "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).

[9] "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment

§718.305(d)(1)(i); *see Minich v. Keystone Coal Mining Co*., 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting).

On this issue, the administrative law judge weighed the opinions of employer's experts, Drs. Fino and Vuskovich. He considered the entirety of Dr. Fino's opinion that claimant's emphysema is due to smoking and, contrary to employer's contention, permissibly found it unpersuasive because the doctor did not adequately explain why coal mine dust exposure did not "contribute to" or "aggravate" claimant's emphysema. Decision and Order at 27; *see Island Creek Coal Co. v. Young*, 947 F.3d 399, 403-07 (6th Cir. 2020); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Director's Exhibit 11; Employer's Exhibit 4. He also permissibly found Dr. Fino's rationale for excluding legal pneumoconiosis inconsistent with the regulations and the medical literature the Department of Labor relied on, as cited in the preamble to the 2001 regulations. *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490-91 (6th Cir. 2014); 20 C.F.R. §718.201(c) (pneumoconiosis is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000) (coal miners have an increased risk of developing chronic obstructive pulmonary disease); Decision and Order at 27.

The administrative law judge noted Dr. Vuskovich excluded a diagnosis of legal pneumoconiosis based in part on the doctor's opinion that claimant does not have emphysema. Decision and Order at 28; Employer's Exhibits 2, 7. Contrary to employer's argument, the administrative law judge permissibly found this reasoning unpersuasive because the doctor "fail[ed] to address in any way, the finding by numerous physicians interpreting the x-rays and CT [scans] in [c]laimant's treatment records, as well as [e]mployer's own expert, Dr. Fino, that [c]laimant ha[s] emphysema." Decision and Order at 28; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

Employer's argument that the administrative law judge did not adequately analyze its experts' opinions constitutes a request to reweigh the evidence, which the Board is not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). Thus, we affirm the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

We also affirm the administrative law judge's finding that employer failed to establish 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). He permissibly discredited the opinions of Drs. Fino and Vuskovich on the cause of claimant's

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significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

total disability because they did not diagnose pneumoconiosis, contrary to his finding that employer failed to disprove the disease.[10] 20 C.F.R. §718.305(d)(1)(ii); *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 28-29.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[10] Drs. Fino and Vuskovich did not offer explanations for claimant's impairment independent of their explanations as to the existence of pneumoconiosis. Director's Exhibit 11; Employer's Exhibits 2, 4, 7.