BRB No. 11-0330 BLA

DAVID WILLIAM MEADE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KIAH CREEK MINING, INCORPORATED	)	
	)	
and	)	
	)	
QUAKER COAL COMPANY	)	DATE ISSUED: 01/20/2012
	)	
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 – Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (10-BLA-5067) of Administrative Law Judge Daniel F. Solomon rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case involves a miner's claim filed on August 27, 2008. The administrative law judge accepted the parties' stipulation to fifteen years and ten months of coal mine employment,[1] all of which, the administrative law judge found, was underground employment. The administrative law judge further found that employer is the responsible operator, and that the medical evidence did not establish the existence of complicated pneumoconiosis and thus, did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304.

Next, the administrative law judge noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner 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 that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

Applying amended Section 411(c)(4), the administrative law judge found that, because claimant established at least fifteen years of qualifying coal mine employment and the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), claimant invoked the rebuttable presumption. The administrative law judge also found that employer failed to rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in finding that it is the responsible operator, because there is no evidence establishing that claimant worked for employer for at least one year. Employer further asserts that the

[1] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 3, 9.

administrative law judge erred in failing to address whether claimant has legal pneumoconiosis, and erred in his analysis of the medical opinion evidence regarding the cause of claimant's total disability, when he found that employer did not establish rebuttal of the Section 411(c)(4) presumption.[2] Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging affirmance of the administrative law judge's responsible operator determination.

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).

Responsible Operator

Employer asserts that the administrative law judge's finding that it is the responsible operator is erroneous. Specifically, employer asserts that, contrary to the administrative law judge's finding, the Director failed to establish that claimant worked for employer for a least one year. Therefore, employer asserts, the Director failed to satisfy its burden to establish that employer was a potentially liable operator. Employer's contention lacks merit.

The regulations provide that the operator responsible for the payment of benefits is the most recent operator to employ the miner, provided that it meets the criteria of a "potentially liable operator," pursuant to 20 C.F.R. §725.494. 20 C.F.R. §§725.494(c), 725.495(a)(1). In determining whether an employer is a potentially liable operator, the Director must establish, *inter alia*, that the miner worked for the operator for at least one year.[3] 20 C.F.R. §725.494(c). A "year" is defined as "one calendar year . . . or partial

[2] Employer does not challenge the administrative law judge's findings of fifteen years and ten months of underground coal mine employment, that the evidence established invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and that employer did not meet its rebuttal burden to demonstrate that claimant does not have clinical pneumoconiosis based on the x-ray evidence submitted under 20 C.F.R. §718.202(a)(1). Therefore, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] In identifying a potentially liable operator, in addition to establishing that the miner worked for the operator for at least one year, the Director must also establish that the miner's disability or death arose out of employment with that operator; that the entity was an operator after June 30, 1973; that the miner's employment included at least one

periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32). Where the evidence establishes that the miner's employment lasted for at least one year, "it shall be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment."[4] 20 C.F.R. §725.101(a)(32)(ii).

In finding that claimant worked for employer for at least one year, the administrative law judge considered the documentary evidence, including claimant's Social Security Statement of Earnings, together with claimant's deposition testimony and his testimony at the hearing. Decision and Order at 6. The administrative law judge correctly found that claimant's Social Security earnings records established that claimant's last year of coal mine employment was for employer (Kiah Creek Mining), from 1996 to 1997. Decision and Order at 6; Director's Exhibit 9. The administrative law judge also noted that on an Employment Questionnaire completed by claimant on September 17, 2008, claimant indicated that he worked for employer for "a full year (365 days)," that he first worked for employer in 1996, and that his final work for employer was in April, 1997. Decision and Order at 6; Director's Exhibit 6. The administrative law judge found that this evidence was corroborated by claimant's deposition and hearing testimony that he worked continuously for employer for "[a]bout a year, maybe a little more," from 1996 to 1997.[5] Decision and Order at 6; Director's Exhibit 8 at 5; Hearing Transcript at 10-11. Relying on this evidence, and noting that employer had submitted no contrary evidence, the administrative law judge found that claimant worked for employer for the requisite year, and that, therefore, employer was properly identified as a potentially liable operator. Decision and Order at 7. Thus, the administrative law judge concluded that employer is the responsible operator. Decision and Order at 7.

Dates and length of coal mine employment may be established by any credible evidence including, but not limited to, company records, pension records, earnings statements, coworkers' affidavits and sworn testimony. 20 C.F.R. §725.101(a)(32)(ii); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007). Although the exact beginning or ending dates for claimant's employment at Kiah Creek Mining are not

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working day after December 31, 1969; and that the operator is financially capable of assuming liability for the claim. 20 C.F.R. §725.494(a)-(e).

[4] Employer does not contest that claimant had at least 125 working days with employer.

[5] Claimant further testified that, in addition to working for employer in 1996 and 1997, he had worked for it previously, although he did not remember when. Director's Exhibit 8 at 7.

clear, the administrative law judge acted within his discretion in finding that claimant's sworn testimony regarding his employment with Kiah Creek Mining, together with his Social Security Statement of Earnings, and his Employment Questionnaire, supported a finding that claimant worked for employer for at least a year. Decision and Order at 6-7. As substantial evidence supports the administrative law judge's conclusion that claimant worked for employer for one year, *see* 20 C.F.R. §§725.495(c)(2), 725.101(a)(32); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Miller v. Director, OWCP*, 7 BLR 1-693, 1-694 (1985), and as employer does not assert that claimant worked for less than 125 working days, we affirm the administrative law judge's determination that employer was properly named a potentially liable operator. Consequently, as employer raises no additional arguments regarding its responsible operator status, we affirm the administrative law judge's determination that employer is the responsible operator.

Merits of Entitlement

Employer asserts that the administrative law judge erred in finding that employer did not establish rebuttal of the Section 411(c)(4) presumption. Specifically, employer argues that the administrative law judge failed to consider the existence of legal pneumoconiosis,[6] and that he erred by improperly evaluating the evidence regarding the cause of claimant's disability.

The administrative law judge found that the evidence did not establish rebuttal of the Section 411(c)(4) presumption. Specifically, he found that the chest x-ray evidence established the existence of clinical pneumoconiosis under Section 718.202(a)(1), and therefore determined that employer did not meet its burden of establishing that claimant does not suffer from pneumoconiosis. The administrative law judge also found that employer did not rebut the presumption by establishing that claimant's totally disabling

[6] A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Clinical pneumoconiosis is a disease "characterized by [the] 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). 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

respiratory impairment was not caused, at least in part, by his exposure to coal mine dust. Decision and Order at 22-23.

We first consider employer's assertion that the administrative law judge erred by failing to make findings regarding the existence of legal pneumoconiosis, after he determined that the x-ray evidence established the existence of clinical pneumoconiosis. The Section 411(c)(4) presumption may be rebutted by a showing that claimant does not suffer from pneumoconiosis. To do so, employer must establish that claimant does not have either clinical pneumoconiosis or legal pneumoconiosis. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, BLR (6th Cir. 2011). Because the administrative law judge determined that the evidence established the existence of clinical pneumoconiosis, a finding that employer does not challenge, employer cannot establish rebuttal by proving the non-existence of pneumoconiosis. Therefore, there was no need for the administrative law judge to address whether employer established the absence of legal pneumoconiosis, and we reject employer's assertion in this regard.

We next consider employer's assertion regarding the cause of claimant's disability. Employer may rebut the Section 411(c)(4) presumption by establishing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). The administrative law judge considered the medical opinions of Drs. Fernandes and Baker, that claimant's tobacco use and coal mine dust exposure were significant contributors to his disability, the opinion of Dr. Dahhan, that claimant's impairment was due to cigarette-induced lung disease and the loss of a portion of his lung due to treatment for lung cancer, and the opinion of Dr. Jarboe, that claimant's smoking caused his respiratory impairment.[7] The administrative law judge accorded "less weight to the opinions of the examining physicians to the extent that they did not diagnose clinical coal workers' pneumoconiosis, contrary to the

[7] Dr. Jarboe opined that claimant's disabling pulmonary impairment was caused by his lengthy cigarette smoking history, and he stated that coal mine dust inhalation did not contribute to his pulmonary impairment. Director's Exhibit 15; Employer's Exhibit 4. Dr. Dahhan opined that claimant's pulmonary impairment is the result of his cigarette smoke-induced lung disease and the loss of a portion of his lung tissue, which was treatment for lung cancer. He further stated that there is no evidence that claimant's pulmonary impairment is related to his coal dust exposure. Director's Exhibit 14; Employer's Exhibit 1. Dr. Fernandes stated that claimant is totally disabled, and he opined that claimant's tobacco use and his coal dust exposure both contributed to his disability. Director's Exhibit 12. Dr. Baker diagnosed a severe and disabling pulmonary impairment, caused by coal workers' pneumoconiosis, chronic obstructive pulmonary disease, chronic bronchitis, and severe resting arterial hypoxemia. Claimant's Exhibit 2.

determination that the existence of clinical pneumoconiosis was established." Decision and Order at 23.

Employer contends that the administrative law judge erred in discounting the disability causation opinions of Drs. Dahhan and Jarboe because they did not diagnose claimant with clinical pneumoconiosis, as there is no evidence that claimant's clinical pneumoconiosis contributes to his impairment. Employer's Brief at 13. Contrary to employer's contention, the administrative law judge rationally discounted the opinions of Drs. Dahhan and Jarboe as to the cause of claimant's impairment, because these doctors' opinions conflict with the administrative law judge's finding that the x-ray evidence establishes the existence of clinical pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986). Therefore, we affirm the administrative law judge's finding that employer failed to meet its burden to establish that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). Because we affirm the administrative law judge's findings that employer did not establish rebuttal of the Section 411(c)(4) presumption, we affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge