U.S. Department of Labor

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

BRB No. 16-0199 BLA

JERRY L. POTTS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLACK BEAUTY COAL COMPANY	)	DATE ISSUED: 01/25/2017
	)	
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 Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (Maia 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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (11-BLA-5820) of Administrative Law Judge Paul R. Almanza awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on January 22, 2010.

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[1] the administrative law judge credited claimant with more than fifteen years of underground coal mine employment,[2] and found that the evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant 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 argues that the administrative law judge erred in crediting claimant with fifteen years of qualifying coal mine employment. Employer also contends that the administrative law judge erred in finding that the evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Employer, therefore, argues that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits.

The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's finding that the evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The Director also argues that the administrative law judge

[1] 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.

[2] Claimant's coal mine employment was in Illinois. Hearing Transcript at 43. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

properly determined that employer did not rebut the Section 411(c)(4) presumption. However, the Director contends that, if the administrative law judge's findings "do not independently establish [claimant's] entitlement," the case must be remanded for further consideration of whether claimant has established the requisite fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. In a combined reply brief, employer reiterates its previous 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. 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 argues that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer initially challenges the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment. Section 411(c)(4), as implemented by 20 C.F.R. §718.305, requires at least fifteen years of employment, either in "underground coal mines," or in "coal mines other than underground coal mines" in substantially similar conditions. Section 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).

Employer challenges the administrative law judge's reliance on 20 C.F.R. §718.305(b)(2), which employer contends is arbitrary, capricious, and an abuse of discretion. Employer's Brief at 17. In promulgating 20 C.F.R. §718.305(b)(2), the Department of Labor (DOL) explained that the regulation was intended to codify the Director's long-standing interpretation of "substantially similar," as reflected in the standard set forth by the United States Court of Appeals for the Seventh Circuit in *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988).[3] 78 Fed. Reg. 59,102, 59,104 (Sept. 25, 2013). The United States Courts of

[3] In *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988), interpreting the originally-enacted Section 411(c)(4), the Seventh Circuit rejected the argument that surface miners needed to present evidence addressing the conditions in underground mines in order to prove substantial similarity. Instead, the court held that an aboveground miner "is required only to produce sufficient evidence of the surface mining conditions under which he worked." *Id.*

Appeals for the Sixth and Tenth Circuits have recognized that 20 C.F.R. §718.305(b)(2) did not change the law, but merely codified the DOL's long-standing position. *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90, 25 BLR 2-633, 2-642-43 (6th Cir. 2014); *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). As the Act does not define the term "substantially similar," the DOL promulgated 20 C.F.R. §718.305(b)(2) in order to fill the legislative gap. The Director's long-standing interpretation of the Act is reasonable and entitled to deference. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984). Consequently, we reject employer's argument the administrative law judge erred in relying upon 20 C.F.R. §718.305(b)(2).

Employer next argues that, even if the administrative law judge could rely upon 20 C.F.R. §718.305(b)(2), the administrative law judge erred in not applying it in this case. We agree. Claimant's coal mine employment occurred exclusively aboveground. Hearing Transcript at 43. Because the administrative law judge mistakenly believed that the parties stipulated to fifteen years of *underground* coal mine employment, Decision and Order at 11, he did not determine whether claimant was regularly exposed to coal-mine dust during his aboveground coal mine employment. 20 C.F.R. §718.205(b)(2). We, therefore, vacate the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment, and remand the case for further consideration.[4]

Employer also argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Employer specifically argues that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

The administrative law judge considered the medical opinions of Drs. Houser, Tuteur, Rasmussen, and Repsher. While Drs. Houser, Tuteur and Rasmussen opined that

[4] Claimant argues that his uncontradicted hearing testimony establishes that he was regularly exposed to coal-mine dust for at least fifteen years of his surface coal mine employment. Claimant's Brief at 7. However, the administrative law judge, in his role as fact-finder, has broad discretion in evaluating the credibility of the evidence of record, including witness testimony. *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, the administrative law judge, not the Board, must address the credibility of claimant's testimony, along with any other relevant evidence, in determining whether claimant has established the requisite fifteen years of qualifying coal mine employment.

claimant is totally disabled from a pulmonary standpoint,[5] Dr. Repsher opined that claimant does not suffer from a totally disabling respiratory or pulmonary impairment. Employer's Exhibit 25 at 36.

In considering the conflicting medical opinion evidence, the administrative law judge accorded less weight to Dr. Repsher's assessment of the extent of claimant's pulmonary impairment because the doctor mischaracterized the exertional requirements of claimant's usual coal mine employment. Decision and Order at 12. The administrative law judge also accorded less weight to Dr. Rasmussen's opinion because he found that the doctor failed to provide a basis for his opinion that claimant is totally disabled. *Id.* The administrative law judge, however, credited the opinions of Drs. Houser and Tuteur, that claimant is totally disabled from a pulmonary standpoint, and found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.*

Employer initially contends that the administrative law judge erred in his consideration of the exertional requirements of claimant's last coal mine job. In addressing the exertional requirements of claimant's last coal mine employment, the administrative law judge found that claimant's last job was to operate the end-loader and the coal crusher. Decision and Order at 3; Hearing Transcript at 31-33, 46. The administrative law judge noted that this job required claimant to shovel coal around the belt line for one and one-half hours a day, and to "occasionally [break] up large pieces of coal in the hopper with a sledge hammer." Decision and Order at 3. The administrative law judge found that claimant's coal mine employment qualified as "heavy work" under 20 C.F.R. §404.1567(c). *Id.*

Employer argues that claimant's "testimony does not establish that his job required heavy or even medium manual labor on a sustained basis." Employer's Brief at 19. Employer, however, does not dispute that claimant's usual coal mine work as the operator of an end-loader/coal crusher required him to shovel around the belt line for one and one-half hours a day.[6] In assessing the medical opinion evidence, the administrative

[5] Dr. Houser opined that claimant is physically unable to perform his prior coal mine job from a respiratory standpoint. Director's Exhibit 10. Dr. Tuteur also opined that claimant is totally disabled from returning to work in the coal mines because of his pulmonary impairment. Employer's Exhibit 6. Dr. Rasmussen opined that claimant suffers from a totally disabling chronic respiratory disease. Claimant's Exhibit 5.

[6] In addition to testifying that he had to shovel coal for one and one-half hours a day, claimant testified that he "had to crawl under the belt . . . with the shovel to get . . .

law judge noted that Dr. Houser was aware that part of claimant's duties involved shoveling coal around the belt lines.[7] Decision and Order at 7. Conversely, the administrative law judge noted that Dr. Repsher mistakenly believed that claimant's usual coal mine employment involved only "very light" physical work.[8] Employer's Exhibit 25 at 20. Thus, the administrative law judge permissibly found that Dr. Houser relied upon an accurate understanding of the exertional requirements of claimant's usual coal mine employment,[9] while Dr. Repsher did not. Consequently, the administrative law judge permissibly discredited Dr. Repsher's opinion that claimant's pulmonary impairment is not totally disabling, because the doctor based his opinion on an inaccurate account of the exertional requirements of claimant's usual coal mine employment. *See Gonzales v. Director,* OWCP, 869 F.2d 776, 779, 12 BLR 2-192, 2-197 (3d Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Employer next argues that the administrative law judge erred in not determining whether the opinions of Drs. Houser, Tuteur, and Rasmussen were sufficiently reasoned. We disagree. The administrative law judge noted that Drs. Houser and Tuteur based their assessments of the extent of claimant's pulmonary impairment on the results of claimant's exercise blood gas study.[10] Decision and Order at 12. Dr. Houser opined that claimant's exercise blood gas study revealed moderate hypoxemia, Director's Exhibit 10

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coal out," and to crawl under the hopper when coal became stuck. Hearing Transcript at 47.

[7] Dr. Tuteur, employer's physician, also opined that claimant is totally disabled from returning to work in the coal mines due to his pulmonary condition. Employer's Exhibit 6.

[8] Dr. Repsher testified that the most strenuous part of claimant's usual coal mine employment involved "climbing onto his heavy equipment or climbing into his truck." Employer's Exhibit 25 at 20.

[9] Employer does not assert that Dr. Houser had an inaccurate understanding of the exertional requirements of claimant's usual coal mine employment. Because Dr. Houser relied upon an accurate understanding of the exertional requirements of claimant's usual coal mine employment, the administrative law judge's mischaracterization, if any, of those requirements is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1984).

[10] As previously noted, the administrative law judge accorded less weight to Dr. Rasmussen's opinion because the doctor failed to provide a basis for his determination that claimant is totally disabled. Decision and Order at 12; Claimant's Exhibit 5.

at 6, while Dr. Tuteur found an "impairment of oxygen gas exchange at rest that worsens during exercise." Employer's Exhibit 6 at 4. Consequently, the administrative law judge, permissibly found that that the opinions of Drs. Houser and Tuteur were sufficiently reasoned to support a finding of total disability. *See Clark*, 12 BLR at 1-155; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). We, therefore, affirm the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Employer next contends that the administrative law judge erred in not weighing all of the relevant evidence together pursuant to 20 C.F.R. §718.204(b). We disagree. The administrative law judge noted that while Drs. Houser and Tuteur acknowledged that claimant's pulmonary function studies did not demonstrate significant airflow obstruction, they nevertheless opined that claimant was totally disabled based upon their interpretation of the arterial blood gas study results. Decision and Order at 12; *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(en banc). We, therefore, affirm the administrative law judge's finding that the medical evidence established total disability pursuant to 20 C.F.R. §718.204(b).

Thus, if on remand, the administrative law judge determines that claimant has established fifteen years of qualifying coal mine employment, claimant will be entitled to invocation of the Section 411(c)(4) presumption.

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

In the interest of judicial economy, we will address employer's contention that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, in the event that the administrative law judge, on remand, again finds the Section 411(c)(4) presumption invoked. If claimant invokes the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifts to employer to rebut the presumption by establishing that claimant does not have either legal or clinical pneumoconiosis,[11] 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

[11] "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).

caused by pneumoconiosis as defined in §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.

In addressing whether employer disproved the existence of legal pneumoconiosis,[12] the administrative law judge considered the medical opinions of Drs. Houser, Rasmussen, Tuteur, and Repsher. Drs. Houser and Rasmussen diagnosed legal pneumoconiosis, in the form of emphysema due to both cigarette smoking and coal-mine dust exposure. Director's Exhibit 10; Claimant's Exhibit 5. In contrast, Drs. Tuteur and Repsher diagnosed chronic obstructive pulmonary disease (COPD) due to cigarette smoking.[13] Employer's Exhibits 21 at 42-43, 25 at 15. Drs. Tuteur and Repsher opined that claimant does not suffer from legal pneumoconiosis. Employer's Exhibits 6, 25 at 36.

The administrative law judge discredited the opinions of Drs. Tuteur and Repsher because he found that each was inadequately explained and inconsistent with the scientific evidence credited by the Department of Labor (DOL) in the preamble to the 2001 revised regulations. Decision and Order at 13-15. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis. Decision and Order at 15.

Initially, we reject employer's contention that the administrative law judge erred in referring to the preamble to the 2001 regulatory revisions in determining the credibility of the medical opinion evidence. The administrative law judge has the discretion to consult the preamble to the regulations as an authoritative statement of medical principles accepted by the Department when it revised the definition of pneumoconiosis to include obstructive respiratory or pulmonary impairments arising out of coal mine dust exposure. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *see also A & E Coal Co. v. Adams*, 694 F.3d 798, 802, 25 BLR 2-203, 2-211 (6th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011).

We also reject employer's contention that the administrative law judge erred in according less weight to the opinions of Drs. Tuteur and Repsher. Specifically, the

[12] The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis. Decision and Order at 13.

[13] Dr. Tuteur opined that claimant's gastroesophageal reflux disease was also a potential contributor to his chronic obstructive pulmonary disease. Employer's Exhibit 21 at 43.

administrative law judge found that Drs. Tuteur and Repsher relied, in part, on their shared view that coal mine dust exposure rarely causes a degree of COPD that is clinically significant.[14] Decision and Order at 15. In developing the revised definition of pneumoconiosis set forth in 20 C.F.R. §718.201(a), the Department of Labor reviewed the medical literature on that issue and found that there was a consensus among medical experts that coal mine dust-induced COPD is clinically significant and is not rare. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; 65 Fed. Reg. 79,920, 79,939-45 (Dec. 20, 2000). Accordingly, the administrative law judge acted within his discretion as fact-finder in determining that the opinions of Drs. Tuteur and Repsher were entitled to diminished weight. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). Thus, the administrative law judge provided a valid reason for discrediting the opinions of Drs. Tuteur and Repsher, attributing claimant's disabling obstructive impairment solely to smoking.[15] Therefore, we reject employer's allegations of error, and affirm the administrative law judge's finding that employer did not disprove the existence of legal pneumoconiosis. We therefore affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. *See Burris*, 732 F.3d at 734, 25 BLR at 2-424.

With regard to the second method of rebuttal, the administrative law judge permissibly found that the same reasons for which he discredited the opinions of Drs. Tuteur and Repsher, that claimant does not suffer from legal pneumoconiosis, also

[14] Although Dr. Tuteur acknowledged that a coal miner will occasionally develop chronic obstructive pulmonary disease as a result of coal mine dust exposure, he stated that it "just occurs so infrequently that it does not influence the rate of fall of the average (FEV1) found for the population." Employer's Exhibit 6 at 6. Dr. Tuteur opined that it is so infrequent that "it just doesn't show up." Employer's Exhibit 21 at 42.

Based upon his review of several studies, Dr. Repsher indicated that, while "some miners would have a clinically significant loss of FEV1," the "vast majority would have none or only a clinically insignificant loss of FEV1." Director's Exhibit 24 at 4. Based on these results, Dr. Repsher opined that, even if coal-mine dust exposure contributed to claimant's decrease in FEV1, that contribution would "not be clinically significant" compared to the effects of claimant's cigarette smoking and aging. *Id.*

[15] Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Tuteur and Repsher, 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).

undercut their opinions that claimant's total disability was not caused by pneumoconiosis. *See Burris*, 732 F.3d at 735, 25 BLR at 2-425; *Stalcup v. Peabody Coal Co*., 477 F.3d 482, 484, 24 BLR 2-33, 2-37 (7th Cir. 2007); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69, 22 BLR 2-311, 2-318 (7th Cir. 2001); *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895, 13 BLR 2-348, 2-355 (7th Cir. 1990); Decision and Order at 32. The administrative law judge also reasonably discredited Dr. Repsher's opinion because, contrary to the administrative law judge's finding, the physician did not diagnose claimant as suffering from a totally disabling pulmonary condition. *See Scott v. Mason Coal Co*., 289 F.3d 263, 269, 22 BLR 2-372, 2-384 (4th Cir. 2002); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 16. Consequently, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by establishing that no part of claimant's disability was due to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

In summary, if the administrative law judge finds on remand that claimant has established fifteen years of qualifying coal mine employment, claimant is entitled to invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. In that case, in light of our affirmance of the administrative law judge's finding that employer failed to establish rebuttal of the presumption, claimant will be entitled to benefits. However, if the administrative law judge finds that the evidence does not establish fifteen years of qualifying coal mine employment and, therefore, determines that claimant did not invoke the Section 411(c)(4) presumption, he must address whether claimant has satisfied his burden to establish all elements of entitlement under 20 C.F.R. Part 718. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge