U.S. Department of Labor

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

BRB No. 17-0151 BLA

OSCAR W. HANCOCK, JR.	)	
Claimant-Respondent	)	
v.	)	
BULL CREEK COAL CORPORATION	)	DATE ISSUED: 01/18/2018
and	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	
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 Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-BLA-05329) of Administrative Law Judge Larry A. Temin rendered on a miner's subsequent claim filed on February 26, 2013, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge credited claimant with twenty-six years of surface coal mine employment in dust conditions substantially similar to those existing at an underground mine and determined that employer is the properly designated responsible operator. The administrative law judge found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] Thus, the administrative law judge further found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).[3] Finally, the administrative law judge found that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

Employer challenges these findings on appeal.[4] Claimant has not filed a response to employer's appeal. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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[1] Claimant filed his initial claim for benefits on December 23, 2008, which was finally denied by the district director on August 17, 2009, because claimant failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 1.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3).

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established twenty-six years in surface coal mine employment in dust conditions

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.[5] 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

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e).[6] A "successor operator" is defined as "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a).

A successor operator is created when an operator ceases to exist by reorganization, liquidation, sale of assets, merger, consolidation, or division.[7] 20 C.F.R. §725.492(b)(1)-

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substantially similar to those existing at an underground mine. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Director's Exhibit 3; Hearing Transcript at 17.

[6] In order for a coal mine operator to meet the regulatory definition of a "potentially liable operator," the miner's disability or death must have arisen out of employment with the operator; the operator must have been in business after June 30, 1973; the operator must have employed the miner for a cumulative period of not less than one year; the employment must have occurred after December 31, 1969; and the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

[7] In rejecting employer's contention that Black Diamond Mining Company (Black Diamond) is a successor operator of employer, the administrative law judge accurately noted that the record did not contain any evidence that "[e]mployer has ceased to exist by reason of reorganization, liquidation, sale of assets, merger, consolidation or division."

(3). If a successor relationship is established, a miner's tenure with a prior and successor operator may be aggregated to establish the required one year of employment. *See* 20 C.F.R. §§725.101(a)(32), 725.103, 725.494(c). The identification of the responsible operator or carrier must be finally resolved by the district director before a case is referred to the Office of Administrative Law Judges (OALJ). 20 C.F.R. §§725.407(d), 725.414(d), 725.456(b)(1), 725.457(c)(1); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000). The regulations require that, absent extraordinary circumstances, all liability evidence must be submitted to the district director. 20 C.F.R. §725.414(c).

Employer, relying on claimant's hearing testimony, argues that the administrative law judge erred in finding it to be the properly designated responsible operator.[8] Employer asserts that Black Diamond Mining Company (Black Diamond) is liable for benefits because it qualifies as a successor operator of employer. Employer's Brief at 7-11 (unpaginated). Employer thus requests that it be dismissed as a party to the claim and that liability for benefits transfer to the Black Lung Disability Trust Fund. *Id.* at 9.

Employer has waived that argument, however, by not raising it before the district director. "[A]ll parties must notify the district director of the name and current address of any potential witness whose testimony pertains to the liability of a potentially liable operator or the designated responsible operator."[9] 20 C.F.R. §725.414(c). In the absence of such notice, "the testimony of a witness relevant to the liability of a potentially liable

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Decision and Order at 6, *citing* 20 C.F.R. §725.492(b)(1)-(3). This finding is affirmed as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[8] Employer also references the two employment questionnaires, prepared by its officers, stating that claimant worked for employer until May 2006. Employer's Brief at 8 (unpaginated); *see* Director's Exhibits 9, 10. Employer, however, does not explain how the questionnaires assist employer in establishing that Black Diamond is a successor operator of employer. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

[9] In addition, 20 C.F.R. §725.457(c)(1) states:

> In the case of a witness offering testimony relevant to the liability of the responsible operator, in the absence of extraordinary circumstances, the witness must have been identified as a potential hearing witness while the claim was pending before the district director.

20 C.F.R. §725.457(c)(1).

operator or the designated responsible operator will not be admitted in any hearing conducted with respect to the claim unless the administrative law judge finds that the lack of notice should be excused due to extraordinary circumstances." 20 C.F.R. §725.414(c). The administrative law judge is obligated to enforce these limitations even if no party objects to the evidence or testimony. *See Smith v. Martin Cnty. Coal Corp.*, 23 BLR 1-69, 1-74 (2004) (holding that the evidentiary limitations set forth in the regulations are mandatory and, as such, are not subject to waiver).

On June 24, 2013, the district director issued a Schedule for the Submission of Additional Evidence, identifying employer as the responsible operator in this claim.[10] Director's Exhibit 45 at 3. The district director informed the parties that they could submit additional documentary evidence relevant to liability, and could identify witnesses relevant to liability that the designated responsible operator intended to call if the case was referred to the OALJ, pursuant to 20 C.F.R. §725.414(b), (c). *Id*. at 5. The district director stated, "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability, or testimony of a witness not identified at this stage of the proceedings, may be admitted into the record once a case is referred to the [OALJ]." *Id*., *citing* 20 C.F.R. §725.456(b)(1).

Yet, although employer responded to the Schedule for the Submission for Additional Evidence and disputed its status as the responsible operator, employer submitted no additional documentary evidence, nor did employer designate claimant as a liability witness. Director's Exhibit 46. Indeed, employer did not even raise the issue of whether Black Diamond was a successor operator of employer before the district director, maintaining only that claimant worked for Black Diamond for more than one year, which was incorrect.

Claimant's testimony at the hearing thus could be considered only if the administrative law judge found "extraordinary circumstances" to justify its admission into the record. *See Weis v. Marfork Coal Co.*, 23 BLR 1-182, 1-191-92 (2006) (en banc)

[10] The district director sets a schedule for the parties to follow regarding the submission of additional evidence relevant either to claimant's eligibility for benefits or to the liability of the designated responsible operator. *See* 20 C.F.R. §725.410. All documentary evidence regarding a more recent employer's potential liability must be submitted pursuant to this schedule, *see* 20 C.F.R. §725.414, but the time for submission of additional evidence set forth in the schedule "may be extended, for good cause shown, by filing a request for an extension with the district director prior to the expiration of the time period." 20 C.F.R. §725.423. No party requested an extension in this claim to submit evidence relevant to the responsible operator issue before the district director.

(McGranery & Boggs, JJ., dissenting). But employer did not argue before the administrative law judge that its failure to comply with the regulation should be excused due to extraordinary circumstances, nor does it so argue before the Board. Thus, claimant's hearing testimony relevant to the responsible operator issue was inadmissible. *See* 20 C.F.R. §§725.414(c), (d), 725.457(c)(1). A review of the record reveals no other evidence that Black Diamond is a successor operator of employer. Therefore, we affirm the administrative law judge's finding that employer failed to establish that Black Diamond is a potentially liable operator and his determination that employer is the responsible operator.[11]

Invocation of the Section 411(c)(4) Presumption – Total Disability

Employer argues that the administrative law judge erred in finding that the evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4). Specifically, employer contends that the pulmonary function study and medical opinion evidence demonstrate that claimant is not totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).[12]

Employer asserts that the pulmonary function studies are "primarily well above the Federal Criteria for Disability." Employer's Brief at 10 (unpaginated). Contrary to employer's assertion, the administrative law judge accurately determined that of the six

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[11] Even if we were to consider claimant's testimony, however, we would affirm the administrative law judge's finding that it is insufficient to establish that Black Diamond is a successor operator of employer as based on substantial evidence. As the administrative law judge permissibly found, claimant acknowledged that he did not know the precise relationship between the two companies and "had no firsthand knowledge of the specifics of any transactions between [them]." Decision and Order at 6; *see* Hearing Transcript at 31-32. Moreover, as noted above, the administrative law judge further accurately found no evidence that employer has ceased to exist. Decision and Order at 6, *citing* 20 C.F.R. §725.492(b)(1)-(3).

[12] The administrative law judge correctly found that the new blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *See* Decision and Order at 18; Director's Exhibits 21, 25, 25. Also, as the record contains no evidence of cor pulmonale with right-sided congestive heart failure, 20 C.F.R. §718.204(b)(2)(iii) is inapplicable.

valid pulmonary function studies of record,[13] the five most recent studies produced qualifying values pre-bronchodilator and three of the studies also produced qualifying post-bronchodilator values.[14] Decision and Order at 19-23; Director's Exhibits 21, 25, 26, 27; Claimant's Exhibits 4, 5. As employer raises no further arguments regarding the pulmonary function study evidence, we affirm the administrative law judge's finding that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) as based on substantial evidence. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305-06, 23 BLR 2-261, 2-283 (6th Cir. 2005).

Employer next asserts that the medical opinion evidence does not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Specifically, employer asserts that Dr. Zaldivar's opinion that claimant is not disabled "is well-reasoned and supported by the evidence of record."[15] Employer's Brief at 10 (unpaginated); *see* Director's Exhibit 26; Employer's Exhibits 3, 4. We disagree.

In his July 11, 2016 supplemental report, Dr. Zaldivar stated that he had reviewed the two most recent valid, qualifying pulmonary function studies, administered on September 4, 2014 and April 6, 2016, Claimant's Exhibits 4, 5, and again opined that

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[13] The six pulmonary function studies were conducted on February 7, 2013, April 3, 2013, August 6, 2013, August 21, 2013, September 4, 2014 and April 6, 2016. Director's Exhibits 21, 25, 26, 27; Claimant's Exhibits 4, 5. The April 3, 2013, August 6, 2013 and August 21, 2013 studies produced qualifying values pre-bronchodilator and post-bronchodilator. The September 4, 2014 and April 6, 2016 studies produced qualifying values. No bronchodilators were administered.

[14] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[15] Employer does not challenge the administrative law judge's decision to accord "substantial weight" to Dr. Habre's "well-documented and well-reasoned" opinion that claimant is totally disabled. Decision and Order at 23; Director's Exhibits 21, 65. Employer also does not challenge the administrative law judge's decision to accord "little weight" to Dr. Broudy's opinion with respect to total disability because Dr. Broudy "did not discuss the severity of [claimant's] impairment or address whether such impairment would prevent [claimant] from returning to his usual coal mine employment." Decision and Order at 24; Director's Exhibit 25. Therefore, these findings are affirmed. *See Skrack*, 6 BLR at 1-711.

claimant can perform his usual coal mine work. Employer's Exhibit 4. The administrative law judge found that Dr. Zaldivar "did not note what data he relied on when forming his conclusion" and "did not explain why he felt the Claimant retained the pulmonary capacity to work in light of the fact that the most recent [pulmonary function studies] produced qualifying values." Decision and Order at 24; *see* Director's Exhibit 26; Employer's Exhibits 3, 4. Thus, the administrative law judge permissibly concluded that Dr. Zaldivar's opinion was "not well-reasoned and [was] not supported by the medical evidence." Decision and Order at 24; *see Martin*, 400 F.3d at 307, 23 BLR at 2-286-87; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Because it is supported by substantial evidence, we 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). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218-19, 20 BLR 2-360, 2-374 (6th Cir. 1996); *Rowe,* 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 23.

We also affirm the administrative law judge's conclusion that the evidence, when weighed together, established total disability pursuant to 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order at 24. 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 or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2),[16] we further affirm the administrative law judge's determinations that claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[17] or by

[16] The administrative law judge additionally considered the evidence from claimant's prior claim and found that it merited less weight due to its age. Decision and Order at 24.

[17] "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

establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 23.

Employer contends that the administrative law judge applied an incorrect rebuttal standard by requiring "[e]mployer [to] 'rule out' legal pneumoconiosis under the first prong of rebuttal." Employer's Brief at 11 (unpaginated). Employer's argument is without merit. The administrative law judge properly observed that he was required to consider all of the evidence relevant to whether claimant has a chronic lung disease that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 25, *quoting* 20 C.F.R. §718.201(b).

Moreover, in weighing employer's rebuttal evidence, the administrative law judge correctly found that Drs. Zaldivar and Broudy opined that claimant does not have legal pneumoconiosis because they completely exclude coal dust exposure as a causative factor for claimant's chronic obstructive pulmonary disease. The administrative law judge rejected their opinions as not well-reasoned and contrary to the preamble.[18] Decision

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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).

[18] The administrative law judge found that Dr. Zaldivar attributed claimant's chronic obstructive pulmonary disease (COPD) to smoking but "offered no further explanation or objective evidence for his conclusion that [c]laimant's irreversible obstruction was neither caused nor contributed to by his [twenty-six] years of regular coal dust exposure. . . ." Decision and Order at 29. The administrative law judge noted that Dr. Broudy opined that claimant's COPD was due solely to smoking, primarily because claimant stopped working in 2007 but continued to smoke. *Id*. at 31. The administrative law judge found that Dr. Broudy's opinion did not account for the fact that pneumoconiosis is recognized as "a latent and progressive disease which may *first become detectable* only after the cessation of coal mine dust exposure." *Id.*, *citing* 20 C.F.R. §718.201(c). The administrative law judge concluded that neither Dr. Zaldivar nor Dr. Broudy offered opinions that account for the position of the Department of Labor in the preamble that the risks of smoking and coal dust exposure are additive. Decision and Order at 29, 32, *citing* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000).

and Order at 29-31. Other than incorrectly asserting that the administrative law judge applied the wrong rebuttal standard, employer does not specifically challenge the administrative law judge's credibility determinations. *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), aff'g 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). We therefore affirm the administrative law judge's finding that employer did not establish rebuttal pursuant 20 C.F.R. §718.305(d)(1)(i).[19] *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

With regard to the second method of rebuttal, the administrative law judge determined that employer failed to establish that claimant's disability is unrelated to legal pneumoconiosis. The administrative law judge rationally discounted the opinions of Drs. Zaldivar and Broudy relevant to the issue of disability causation because neither

[19] As employer must disprove both clinical and legal pneumoconiosis, employer's failure to establish that claimant does not have legal pneumoconiosis precludes a rebuttal finding under 20 C.F.R. §718.305(d)(1)(i).

physician diagnosed claimant with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1073-74, 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); Decision and Order at 33. We therefore affirm the administrative law judge's determination that employer failed to establish rebuttal of the presumption by establishing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 32-33.

As claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer failed to rebut the presumption, we affirm the award of benefits. 30 U.S.C. §921(c)(4).

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