U.S. Department of Labor

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

BRB No. 17-0214 BLA

TED E. ROBERTS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KT ENTERPRISES OF KENTUCKY	)	DATE ISSUED: 01/31/2018
	)	
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 Granting Modification and Benefits of William T. Barto, Administrative Law Judge, United States Department of Labor.

Dan F. Partin, Harlan, Kentucky, for claimant.

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

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Maia S. 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: BUZZARD, GILLIGAN, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Modification and Benefits (2014-BLA-05321) of Administrative Law Judge William T. Barto, rendered 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). Claimant filed this claim on March 6, 2012. In a Proposed Decision and Order issued on December 20, 2012, the district director denied benefits, finding that claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 30. Claimant timely requested modification of the district director's decision. Director's Exhibit 32. After the district director denied the request for modification, claimant requested a hearing. Director's Exhibit 35. The case was transferred to the Office of Administrative Law Judges, and the administrative law judge held a hearing on June 30, 2016.

In a Decision and Order issued on January 12, 2017, the administrative law judge determined that employer is the responsible operator. He also credited claimant with twenty-four years of coal mine employment[1] in conditions substantially similar to those in an underground mine, found that claimant established a totally disabling respiratory or pulmonary impairment pursuant 20 C.F.R. §718.204(b)(2), and thus determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further found that employer did not rebut the presumption, and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in finding that it is the responsible operator, in finding that it failed to rebut the Section 411(c)(4) presumption, and in determining the commencement date for benefits. Claimant responds, urging affirmance of the award of benefits and the date for their commencement. The Director, Office of Workers' Compensation Programs (the

[1] Claimant's last coal mine employment was in Kentucky. Decision and Order at 2; Director's Exhibit 3. Accordingly, the Board will apply the law 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).

[2] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he 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 a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

Director), has filed a limited response, urging affirmance of the finding that employer is the responsible operator.[3]

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).

I. 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). An operator is a "potentially liable operator" if the miner was employed by the operator, or any person with respect to which the operator may be considered a successor, for a cumulative period of not less than one year, and the operator is financially capable of assuming liability for the claim.[4] 20 C.F.R. §725.494(c), (e). Once a potentially liable operator has been properly identified by the Director, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits, or that another potentially liable operator more recently employed the miner for at least one year and that operator is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c).

The administrative law judge addressed employer's argument that Northstar Transportation (Northstar) and Dean Knuckles Enterprises (Dean Knuckles) are both potentially liable operators that employed claimant more recently than employer. Decision and Order at 4-7. He determined that employer failed to establish that Northstar is a potentially liable operator, finding that Northstar employed claimant for less than one year. Decision and Order at 5-7. In so finding, the administrative law judge rejected employer's argument that claimant's hearing testimony established that Northstar was a

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-four years of qualifying coal mine employment, total disability at 20 C.F.R. §718.204(b)(2), and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-12.

[4] The regulation at 20 C.F.R §725.494 further requires that the miner's disability or death arose at least in part out of employment with that operator, that the operator, or any person with respect to which the operator may be considered a successor operator, was an operator for any period after June 30, 1973, and that the miner's employment included at least one working day after December 31, 1969. 20 C.F.R §725.494(a)-(e).

successor[5] to employer, and that the time claimant was employed by both companies must therefore be combined to determine whether Northstar employed him for at least one year.[6] The administrative law judge thus found that employer failed to establish that Northstar employed claimant for at least one year pursuant to 20 C.F.R §§725.494(c), 725.495(c)(2). *Id*.

Additionally, the administrative law judge found that "even if [c]laimant's testimony [were] enough to prove that Northstar is a successor operator, [employer] has failed to offer any evidence to contradict" the district director's statement that "Northstar does not possess sufficient assets to pay benefits."[7] Decision and Order at 6. Therefore, the administrative law judge found that employer failed to establish that Northstar is financially capable of assuming liability for the payment of benefits pursuant to 20 C.F.R §§725.494(e), 725.495(c)(2).

In addition, the administrative law judge found that Dean Knuckles was not the operator that most recently employed claimant. Decision and Order at 6-7. The administrative law judge noted that claimant's Social Security Administration (SSA) earnings records documented that he worked for Dean Knuckles from 2008 to 2009. *Id*.

---

[5] 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). Additionally, 20 C.F.R. §725.492(b) states that a successor operator is created when an operator ceases to exist by reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3).

[6] The administrative law judge acknowledged claimant's hearing testimony that "his employment with [Northstar Transportation (Northstar)] was exactly the same as with [employer]." Decision and Order at 5-6; *see* Hearing Transcript at 17-30. However, the administrative law judge found that claimant's hearing testimony was "uncorroborated" and "insufficient to establish a successor relationship." Decision and Order at 6.

[7] The administrative law judge noted that the record contains a statement from the district director that the Office of Workers' Compensation Programs searched its records and found no evidence that Northstar was insured or approved to self-insure on the date of claimant's last employment with it. Decision and Order at 5; Director's Exhibit 25. Pursuant to 20 C.F.R. §725.495(d), the district director's statement constitutes "prima facie evidence that [Northstar] is not financially capable of assuming its liability for a claim."

However, the administrative law judge also found that the SSA records establish that claimant returned to work for employer from 2009 to 2010 for a total of 1.03 years, and, therefore, that claimant worked for employer for at least one year after his employment with Dean Knuckles. *Id*. Pursuant to 20 C.F.R. §725.495(a)(1), the administrative law judge found that employer, rather than Dean Knuckles, is the responsible operator. *Id*.

Employer argues that the administrative law judge erred in finding that claimant's hearing testimony did not establish a successor relationship between Northstar and employer.[8] Employer's Brief at 5-7 (unpaginated). As the Director notes, however, employer has not challenged the administrative law judge's alternate finding that employer failed to establish that Northstar is financially capable of assuming liability for the payment of benefits pursuant to 20 C.F.R §725.494(e). Decision and Order at 6; Director's Brief at 2. Therefore, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Because employer bears the burden of proving both that Northstar more recently employed claimant for at least one year, and that Northstar is financially capable of assuming liability for the payment of benefits, *see* 20 C.F.R. §725.495(c)(2), its failure to establish that Northstar is financially capable of assuming liability precludes a finding that Northstar is a potentially liable operator. 20 C.F.R. §725.494. We therefore need not address its argument that the administrative law judge erred in his consideration of claimant's hearing testimony regarding whether Northstar was a successor operator.[9] *See*

[8] Employer does not challenge the administrative law judge's findings that claimant worked for employer for at least one year after Dean Knuckles Enterprises employed claimant, and that employer is a potentially liable operator. Decision and Order at 6-7. Therefore, we affirm those findings. *See Skrack*, 6 BLR at 1-711.

[9] We agree with the Director, Office of Workers' Compensation Programs, that, in any event, employer cannot rely on claimant's hearing testimony to establish that Northstar was a successor to employer. The regulations require that while the claim is before the district director, "all 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." 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 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 in Section 725.414 are mandatory and thus, are not subject to waiver). The record includes

Shinseki v. Sanders, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference"); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253-54, 25 BLR 2-779, 2-787-89 (4th Cir. 2016). We thus affirm the administrative law judge's finding that employer is the responsible operator.

II. 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,[10] or by 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 20-21.

To establish that claimant does not suffer from legal pneumoconiosis, employer must demonstrate that he does not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[11] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-1-55 n.8 (2015) (Boggs, J., concurring and dissenting). In determining this issue, the administrative law judge considered the medical opinions of Drs. Dahhan and Jarboe. Decision and Order at 16-19. Both doctors

---

a June 10, 2016 letter from employer informing Administrative Law Judge Paul R. Almanza that it was designating claimant as a liability witness. However, there is no indication in the record of such a designation while this claim was before the district director, nor did employer argue to the administrative law judge that its failure to provide the required notice to the district director should be excused due to extraordinary circumstances. Therefore, claimant's hearing testimony relevant to Northstar's status as a potentially liable operator was inadmissible. 20 C.F.R. §725.414(c).

[10] "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).

[11] The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis. Decision and Order at 14, 16.

opined that claimant does not have legal pneumoconiosis, but has an obstructive respiratory impairment, in the form of emphysema and chronic bronchitis, due solely to cigarette smoking. Director's Exhibit 20; Employer's Exhibits 1, 2. The administrative law judge found that the opinions of both physicians were "problematic and, as such, d[id] not constitute reasoned and documented medical opinions." Decision and Order at 18. The administrative law judge therefore found that employer failed to establish that claimant does not have legal pneumoconiosis.[12]

Employer contends that the administrative law judge applied an improper rebuttal standard with respect to legal pneumoconiosis by requiring its physicians to rule out the possibility that coal mine dust contributed to claimant's obstructive lung disease. Employer's Brief at 7-9 (unpaginated). We disagree.

The administrative law judge correctly stated that in order to establish rebuttal via the first available method, employer must establish "that the miner has neither clinical nor legal pneumoconiosis." Decision and Order at 13. The administrative law judge also correctly noted that legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." *Id.*, *quoting* 20 C.F.R. §718.201(a)(1). Under 20 C.F.R. §718.201(b), a disease "arising out of coal mine employment" includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."

In considering the opinions of Drs. Dahhan and Jarboe, the administrative law judge did not, as employer asserts, require these physicians to "rule out" all contribution by coal mine dust exposure to claimant's obstructive impairment in order to disprove legal pneumoconiosis. Employer's Brief at 7-9 (unpaginated). Rather, the administrative law judge concluded that the opinions of Drs. Jarboe and Dahhan were "conclusory," because both physicians "fail[ed] to adequately explain why they believed that coal [mine] dust exposure did not contribute to or exacerbate the miner's allegedly smoking-related impairment in any way." Decision and Order at 18. Consequently, as the administrative law judge applied the correct rebuttal standard in evaluating whether

[12] The administrative law judge also considered the medical opinions of Drs. Kaw and Alam. Decision and Order at 17-20; Employer's Exhibit 2; Claimant's Exhibit 2. He found that Dr. Kaw diagnosed chronic obstructive pulmonary disease, but did not address the etiology of the disease. Decision and Order at 17. He discredited Dr. Alam's opinion diagnosing legal pneumoconiosis, finding it to be conclusory. Decision and Order at 19-20. And, he further noted that the opinions of Drs. Kaw and Alam do not assist employer in rebutting the presumption that claimant has legal pneumoconiosis. *Id.* at 17, 20.

employer disproved the existence of legal pneumoconiosis, employer's assertion of error is rejected. *See Minich*, 25 BLR at 1-154-56.

Moreover, based on the administrative law judge's determination that their opinions were not adequately reasoned, Decision and Order at 18-19, he found that they were not sufficiently credible to rebut the presumed existence of legal pneumoconiosis, regardless of the standard.[13] *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-739-40 (6th Cir. 2015); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *see also Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103-04 (7th Cir. 2008). Employer does not challenge any of the administrative law judge's specific credibility determinations with respect to the opinions of Drs. Dahhan and Jarboe. Therefore, we affirm the administrative law judge's finding that their medical opinions were inadequately explained and not well-reasoned. *See Skrack*, 6 BLR at 1-711; Decision and Order at 16-19. Thus, we affirm the administrative law judge's finding that employer failed to disprove legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i).

Upon finding that employer was unable to disprove legal pneumoconiosis, the administrative law judge addressed whether employer could disprove disability causation 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 21. The administrative law judge permissibly found that the same reasons for which he

[13] Specifically, the administrative law judge found that Dr. Dahhan's opinion was conclusory and did not adequately explain why claimant's obstructive impairment, even if caused by smoking, was not significantly related to, or substantially aggravated by, coal mine dust exposure. Decision and Order at 18. The administrative law judge found that Dr. Jarboe's opinion was unpersuasive because it was "based on generalities." *Id*. at 18. Moreover, he found that Dr. Jarboe's reliance on claimant's residual volume to attribute claimant's obstructive impairment to smoking was unpersuasive, because Dr. Jarboe did not "provide any comparison between the residual volume of coal miners and those of smokers . . . ." *Id*. at 18-19. In addition, he found that Dr. Jarboe's reliance on bronchoreversibility seen on claimant's pulmonary function studies was not a convincing reason for concluding that claimant does not have legal pneumoconiosis. *Id*. at 19. He also found that Dr. Jarboe did not adequately explain why coal mine dust exposure did not cause or contribute to claimant's chronic bronchitis. *Id*. Finally, he noted that Dr. Jarboe excluded legal pneumoconiosis because of claimant's "limited exposure" to coal mine dust as a surface miner, but did not explain why claimant's "limited exposure" could not have contributed to claimant's obstructive impairment. *Id*.

discredited the opinions of Drs. Dahhan and Jarboe that claimant does not suffer from legal pneumoconiosis also undercut their opinions that claimant's totally disabling respiratory or pulmonary impairment was not caused by pneumoconiosis. *See 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, 25 BLR 2-453 (6th Cir. 2013); Decision and Order at 21. As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, and affirm the award of benefits. 20 C.F.R. §718.305(d)(1)(ii).

III. Benefits Commencement Date

Once entitlement to benefits is established, the date for their commencement is determined by the month in which claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990). The administrative law judge found that the evidence does not establish when claimant became totally disabled due to pneumoconiosis. Decision and Order at 22. Therefore, the administrative law judge awarded benefits as of March 2012, the month in which claimant filed his claim. *See* 20 C.F.R. §725.503(b).

Employer contends that the administrative law judge erred in awarding benefits as of March 2012. Employer's Brief at 9-10 (unpaginated). Employer argues that the district director determined that claimant did not have pneumoconiosis in the district director's December 20, 2012 Proposed Decision and Order, which became final and effective on January 19, 2013. *Id*. Therefore, employer argues that the earliest month for which claimant is entitled to benefits is September 2013, the month in which he requested modification of the district director's decision under 20 C.F.R. §725.310.[14] *Id*. Employer's argument lacks merit.

In arguing that claimant is entitled to benefits no earlier than September 2013, employer effectively argues that claimant has established a change in conditions under 20

[14] Employer does not challenge the administrative law judge's finding that the evidence does not establish when claimant became totally disabled due to pneumoconiosis. Therefore, this finding is affirmed. *See Skrack*, 6 BLR at 1-711.

C.F.R. §725.310 in the time since the district director's denial of benefits, rather than a mistake in a determination of fact.[15] However, the Board has held that where modification of a district director's decision is sought, the administrative law judge proceeds de novo and, therefore, "it is not necessary for the administrative law judge to make a specific preliminary determination" that a basis for modification exists because "the modification finding is subsumed in the administrative law judge's findings on the issues of entitlement." *Kott v. Director, OWCP*, 17 BLR 1-9, 1-13 (1992); *Motichak v. BethEnergy Mines, Inc.*, 17 BLR 1-14, 1-19 (1992).

In this case, claimant sought modification of the district director's decision denying benefits. Proceeding de novo, the administrative law judge found that claimant established entitlement to benefits. The administrative law judge determined that claimant invoked the Section 411(c)(4) presumption and that employer failed to rebut it. In so finding, the administrative law judge discredited all the medical evidence that claimant does not have legal pneumoconiosis and is not totally disabled due to legal pneumoconiosis. The administrative law judge did not credit any evidence that claimant was not totally disabled due to pneumoconiosis at any time subsequent to the filing date of his claim.[16] Because the administrative law judge found that the date of onset of total disability due to pneumoconiosis is not ascertainable, he correctly determined that benefits commence as of the month in which the claim was filed, March 2012.[17] *See* 20

[15] The determination of whether modification is granted based on a mistake in a determination of fact or a change in conditions affects the date from which benefits commence. If modification is based on a change in conditions, claimant is entitled to benefits as of the month of onset of total disability due to pneumoconiosis or, if that date is not ascertainable, as of the date he requested modification. 20 C.F.R. §725.503(d)(2). However, if modification is based on the correction of a mistake in a determination of fact, claimant is entitled to benefits from the date he first became totally disabled due to pneumoconiosis or, if that date is not ascertainable, from the date he filed his claim, unless credited evidence establishes that he was not disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(d)(1); *see Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989).

[16] Both the district director and the administrative law judge found that claimant invoked the Section 411(c)(4) presumption. But, whereas the district director credited Dr. Dahhan's opinion that claimant does not have pneumoconiosis, Director's Exhibit 30, the administrative law judge discredited Dr. Dahhan's opinion.

[17] Moreover, even assuming arguendo that the administrative law judge had to specify a basis for modifying the district director's decision denying benefits and set the benefits commencement date accordingly, we would still affirm his decision to award benefits as of March 2012, the month of filing. For the reasons set forth above, on this

C.F.R. §725.503(b); *Owens*, 14 BLR at 1-50. The finding as to the benefits commencement date is therefore affirmed.

---

record as weighed by the administrative law judge, the only rational conclusion is that claimant established a mistake as to the ultimate fact of entitlement. *See* 20 C.F.R. §725.310; *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994). Since the evidence does not establish when claimant became totally disabled due to pneumoconiosis, he is entitled to benefits as of the month in which he filed the claim. 20 C.F.R. §725.503(b), (d)(1).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge