U.S. Department of Labor

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

BRB No. 17-0676 BLA

JACKIE D. HAUGHT Claimant-Respondent v. R & F COAL COMPANY and TRAVELERS INDEMNITY COMPANY OF ILLINOIS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/30/2019 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05784) of Administrative Law Judge Thomas M. Burke 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). This case involves a miner's claim filed on May 18, 2015.

The administrative law judge found that claimant has over fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), thereby invoking the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis.[1] The administrative law judge further found that employer failed to rebut the presumption and awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption and that employer failed to rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.

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.[2] 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

Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, claimant must establish at least fifteen years of employment in underground coal mines or in surface mines "in conditions

[1] Under Section 411(c)(4) of the Act, a miner is presumed to be totally disabled due to pneumoconiosis if he has 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); 20 C.F.R. §718.305.

[2] This claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 9, 17.

substantially similar to those in underground mines." 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(ii). "The 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); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018) (Kethledge, J., concurring); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90 (6th Cir. 2014).

The administrative law judge initially found that claimant was employed in underground coal mines for "seven years" from 1972 to 1979. Decision and Order at 3. He further found that claimant was employed as a surface coal miner at a coal preparation plant "for ten years" from 1979 to 1989, and credited claimant's hearing testimony to find that claimant was regularly exposed to coal mine dust while working there. *Id*. at 3, 7. Thus, he determined that claimant has at least fifteen years of qualifying coal mine employment sufficient to invoke the Section 411(c)(4) presumption.[3]

Employer does not contest that claimant was employed as an underground coal miner from 1972 to 1979 and as a surface coal miner from 1979 to 1989.[4] Those findings

[3] The administrative law judge credited claimant's testimony that he worked underground for seven years at Ohio Valley Coal Company, as well as his Social Security Administration (SSA) earnings records, which "are consistent with his testimony as they show employment with Ohio Valley Coal Company from 1972 through 1979, including all four quarters of 1972." Decision and Order at 3. The administrative law judge similarly credited claimant's testimony that he worked aboveground at employer's coal preparation plant from 1979 until 1989, as corroborated by his SSA earnings records, which "show employment at R&F Coal Company for ten years from 1979 to 1989." Decision and Order at 3. Although his SSA earnings records show income in 1982 only from an employer with an address in Missouri, claimant testified that this entry is incorrect because he was working for employer at that time. Hearing Transcript at 17; Director's Exhibits 6, 7.

[4] We reject employer's contention that the claim should be remanded because the administrative law judge concluded that claimant has eighteen years of coal mine employment, when his calculations support only seventeen years. Employer's Brief at 2. As an initial matter, the period of time for which claimant was credited with coal mine employment, 1972 – 1989, is eighteen years. Decision and Order at 3. Furthermore, the administrative law judge found that claimant invoked the Section 411(c)(4) presumption based on claimant establishing "over 15 years in coal mine employment either underground or comparable to underground." Decision and Order at 7. Thus, employer has not explained how a finding of seventeen years rather than eighteen years, which it

are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Employer solely challenges the finding that claimant was regularly exposed to coal mine dust as a surface miner. For the reasons that follow, we reject employer's arguments and affirm the administrative law judge's findings.

Employer's first argument, that the administrative law judge erred in relying "solely on claimant's testimony," is without merit, as it is well-established that a claimant's testimony can be sufficient to establish substantial similarity, i.e., that he was regularly exposed to coal mine dust. *See Duncan*, 889 F.3d at 304 (rejecting argument that claimant must provide evidence of "the actual dust conditions" and citing with approval the Department of Labor's position that "dust exposure evidence will be inherently anecdotal"); *Kennard*, 790 F.3d at 664 (claimant's "uncontested lay testimony" regarding his dust conditions "easily supports a finding" of regular dust exposure); *Sterling*, 762 F.3d at 490 (claimant's testimony that the conditions of his employment were "very dusty" sufficient to establish regular exposure).

We further reject employer's argument that claimant was exposed to coal dust only "on occasion" and that "mere evidence of some dust exposure is insufficient to constitute 'substantially similar' dust exposure conditions." Employer's Brief at 3. Employer has not set forth any argument or identified any facts that would undermine the administrative law judge's finding that claimant's credible and uncontradicted testimony establishes that he was "regularly exposed to substantial coal mine dust" during his ten years of aboveground coal mine employment. Decision and Order at 7.

Claimant testified that he began working at employer's coal preparation plant in 1979 and "continually" worked there "through 1989." Hearing Transcript at 17. He was "in charge of the truck and train loadout" and his duties included loading trucks and trains with coal, "keeping the silos clean," and cleaning the tunnel that was below "the coal stacks that went from the stacks to the preparation plant." *Id*. at 17-18, 21. Claimant testified that while loading trucks, he was exposed to dust from the road when trucks "pull[ed] into the loadout." *Id*. at 20-21. He estimated that he loaded coal into 80 trucks per day, five days

---

characterizes as "likely a typographical error," could have made any difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how "error to which [it] points could have made any difference"); Employer's Brief at 2. We further note that in weighing the medical opinions, the administrative law judge did not credit or discredit the physicians based on their reliance on a specific length of coal mine employment; rather, he noted that they each relied on approximately twenty years of coal mine employment. Decision and Order at 5-6; Director's Exhibit 13; Claimant's Exhibit 1; Employer's Exhibit 3.

per week during his first year; after that, he loaded trucks two or three days per week and eventually began loading only trains. *Id*. Although loading trains did not expose him to dust from the road, claimant stated that during "every shift" he was required to clean the silo with a shovel and broom for one and a half to two hours. *Id*. at 21-22. Claimant also stated that every third week, each time he came to work, he cleaned the tunnel below the coal, which involved "shovel[ing] up the loose coal and throw[ing] it back on the [conveyor] belt." *Id*. When asked whether he was working in a "dusty environment" when cleaning the silos and tunnels, claimant stated, "When cleaning around the belt heads and tail rollers. There was dust there." *Id*. at 23. He also answered in the affirmative when asked whether he "breathe[d] dust doing that work." *Id*.

Because it is supported by substantial evidence, namely claimant's uncontradicted hearing testimony, we affirm the administrative law judge's determination that claimant was regularly exposed to coal mine dust while working as a surface miner at employer's coal preparation plant.[5] *See Duncan,* 889 F.3d at 304 (miner's statement that he "had to breathe coal dust all my work in the mines," as supported by widow's testimony and medical opinions, sufficient to establish regular coal dust exposure); *Kennard*, 790 F.3d at 664-65; *Sterling*, 762 F.3d at 490; *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44 & n.17 (10th Cir. 2014) (claimant's testimony that it was impossible to keep the dust out of the cabs of the vehicles he drove, and that he was exposed to "pretty dusty" conditions "provided substantial evidence of regular exposure to coal mine dust"); Decision and Order at 7; Hearing Transcript at 18-23.

Total Disability

To invoke the presumption, claimant must also establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). In finding that the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge credited the medical opinion of Dr. Sood over the contrary opinion of Dr. Rosenberg.[6] Decision and Order at 7-10. He found that Dr. Sood credibly explained why

[5] We thus reject employer's additional contention that "relatively few surface mine workers receive sufficient coal mine dust exposure to cause pneumoconiosis." *See Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 302 (6th Cir. 2018) (Kethledge, J., concurring) ("Logically, miners who are employed at surface coal mines and who are regularly exposed to coal dust face the same risks of developing pneumoconiosis as underground miners."); Employer's Brief at 3.

[6] The administrative law judge found that the pulmonary function studies and blood gas studies do not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), and that 20 C.F.R. §718.204(b)(2)(iii) is inapplicable, as the record contains no evidence

claimant's objective test results, although non-qualifying, prevent claimant from meeting the exertional demands of his previous coal mine job. Decision and Order at 10. Conversely, he found Dr. Rosenberg's statement that the pulmonary function studies are invalid to be "contrary to the other accepted evidence" and further found that Dr. Rosenberg "did not discuss [the] effect [of the blood gas studies] on claimant's ability to work except to remark that they are not qualifying." *Id*.

In the heading of "Argument II" in its brief, employer states that the administrative law judge "erred in concluding that the claimant has a totally disabling pulmonary impairment[.]" Employer's Brief at 4. Employer has not, however, set forth any argument or identified any specific error in the administrative law judge's findings. 20 C.F.R. §802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). We therefore affirm his finding that claimant established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv) and that, when weighed together, the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *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 10.

Because we have affirmed the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(i)-(iii); Decision and Order at 10-11.

---

of cor pulmonale with right-sided congestive heart failure. Decision and Order at 7-8. He also discredited the opinion of Dr. Lenkey that claimant is totally disabled because "he [incorrectly] reported that the pulmonary function tests evidence a total pulmonary disability under the [Department of Labor (DOL)] criteria." *Id*. at 9. We note that Dr. Lenkey described claimant's FEV1 value as being "on the cusp of meeting [the DOL] criteria" while claimant's FEV1/FVC ratio of 54 percent "meets the criteria of being less than 55 percent." Director's Exhibit 13, 17. He did not, as the administrative law judge seems to infer, state that claimant's test results, i.e., the FEV1 and FEV1/FVC results combined, are qualifying for total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and the values set forth at Part 718 Appendix B. Any error is harmless, however, as the administrative law judge permissibly found claimant totally disabled based on the opinion of Dr. Sood. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis,[7] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Relevant to the existence of legal pneumoconiosis,[8] the administrative law judge considered the medical opinions of Drs. Lenkey, Sood, and Rosenberg. Drs. Lenkey and Sood each diagnosed legal pneumoconiosis, while Dr. Rosenberg opined that "the current information does not establish a respiratory disability related to past coal mine dust exposure."[9] Director's Exhibit 13; Claimant's Exhibit 1; Employer's Exhibit 3. The administrative law judge determined that Dr. Rosenberg's opinion is inadequately explained and, therefore, insufficient to disprove legal pneumoconiosis. Decision and Order at 12. He further found that Dr. Rosenberg's opinion is insufficient to establish that legal pneumoconiosis played no part in the miner's total disability because Dr. Rosenberg inaccurately failed to diagnose the miner as being totally disabled. *Id*. at 13.

[7] "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).

[8] The administrative law judge found that employer disproved the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B). Decision and Order at 11-12.

[9] Dr. Rosenberg reviewed the evidence of record, including the medical report of Dr. Lenkey and the objective testing, including those tests administered by Dr. Fino. He opined that claimant does not have "definite" clinical pneumoconiosis, but stated that "further evaluation is needed to assess why he has reduced diffusing capacity measurements." Employer's Exhibit 3. He further opined that the "current information does not establish a respiratory disability in relationship to past coal mine dust exposure." *Id*. Dr. Rosenberg thus concluded that "the available data does not establish [claimant] as having clinical or legal [pneumoconiosis]." *Id*.

Employer summarizes the evidence and generally argues that the administrative law judge erred in finding that "the presumption of disability due to pneumoconiosis was not rebutted." Employer's Brief at 4-6. Employer's only specific argument relevant to its burden on rebuttal, however, is that the administrative law judge erred in discrediting Dr. Rosenberg's opinion on the basis that he did not diagnose claimant with a totally disabling respiratory impairment. According to employer, "the fact that Dr. Rosenberg found no evidence of an impairment that rose to the level of disability is not a basis for dismissing his opinion on the cause of the impairment." *Id*. at 6.

As an initial matter, employer's argument does not address the administrative law judge's rationale for discrediting Dr. Rosenberg on whether claimant has legal pneumoconiosis. The administrative law judge accurately noted that Dr. Rosenberg did not provide any explanation for his determination that claimant does not have legal pneumoconiosis, but rather provided only a conclusory statement. Decision and Order at 12. Specifically, Dr. Rosenberg found the presence of oxygenation abnormalities and a severely reduced diffusion capacity but offered no explanation regarding the cause, stating only that "[t]he current information does not establish a respiratory disability in relationship to past coal mine dust exposure."[10] *Id*.; Employer's Exhibit 3. As the administrative law judge's finding is rational and supported by substantial evidence, it is affirmed. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305-06 (6th Cir. 2005); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

As the administrative law judge permissibly discounted the only opinion supportive of employer's burden to disprove legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A).[11] Employer's failure to disprove legal pneumoconiosis

[10] In the "Conclusion" section of his medical opinion, Dr. Rosenberg stated that the "available data does not establish" legal pneumoconiosis, and the "information does not establish a qualifying respiratory disorder," but he did not offer any additional explanation for his conclusion that claimant does not have a coal dust-related impairment. Employer's Exhibit 3.

[11] Because the administrative law judge provided valid reasons for discrediting the opinion of Drs. Rosenberg, the only opinion supportive of employer's burden, we need not address employer's remaining arguments regarding the weight he accorded the contrary opinions of Drs. Lenkey and Sood. *See Larioni*, 6 BLR at 1-1278.

precludes a rebuttal finding that claimant does not have pneumoconiosis. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011).

Furthermore, we see no error in the administrative law judge's decision to discount Dr. Rosenberg's opinion on the cause of claimant's totally disabling respiratory impairment at 20 C.F.R. §718.305(d)(1)(ii) because he failed to diagnose claimant as having such an impairment.[12] *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013); Decision and Order at 13. We therefore affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption that claimant is totally disabled due to pneumoconiosis.

Because claimant invoked the Section 411(c)(4) presumption and employer did not rebut it, claimant is entitled to benefits.

[12] Employer has not explained how Dr. Rosenberg's inaccurate view that "the information does not establish respiratory disability" renders his opinion on the cause of that disability more credible than had he inaccurately stated that claimant has "no impairment." Employer's Brief at 6. Regardless of employer's attempt to differentiate between these two characterizations, it remains that Dr. Rosenberg offered only a conclusory statement that claimant does not have legal pneumoconiosis and failed to diagnose claimant as having a totally disabling respiratory impairment. Thus, the administrative law judge permissibly found his opinion insufficient to meet employer's burden at 20 C.F.R. §718.305(d)(1)(i), (ii). *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge