U.S. Department of Labor

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

BRB No. 19-0025 BLA

THOMAS W. ROBINSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RON STEPP CONSTRUCTION COMPANY	)	DATE ISSUED: 01/30/2020
	)	
and	)	
	)	
KESA	)	
	)	
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 Patrick Rosenow, Administrative Law Judge, United States Department of Labor.

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

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05806) of Administrative Law Judge Patrick Rosenow rendered pursuant to 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 June 3, 2015.

The administrative law judge credited claimant with twenty-seven years of coal mine employment, at least fifteen years of which occurred aboveground at underground mines or at preparation plants where claimant was regularly exposed to coal mine dust. He also found the evidence established total respiratory or pulmonary disability and, therefore, found claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer asserts the administrative law judge erred in crediting claimant with at least fifteen years of qualifying coal mine employment and, therefore, erred in finding claimant invoked the Section 411(c)(4) presumption. Employer further contends the administrative law judge erred in finding the evidence did not disprove the existence of legal pneumoconiosis and thus in concluding it did not rebut the presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order Awarding Benefits must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as

[1] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or surface 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); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established twenty-seven years of coal mine employment and a totally disabling impairment under 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe*

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
Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, claimant must establish he had at least fifteen years of employment "in one or more underground coal mines" or in surface mines "in conditions substantially similar to those in underground mines." 30 U.S.C. §921(c)(4) (2012); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). "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 [he] was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

The administrative law judge found claimant worked in coal mine employment for a minimum of twenty-seven years. He further found claimant established "at the very least" fifteen years of qualifying coal mine employment either at underground coal mines or at preparation plants where he was regularly exposed to coal mine dust. Decision and Order at 9-10.

Employer does not dispute the administrative law judge's finding that claimant had more than fifteen years of coal mine employment,[4] but challenges his finding that claimant's employment occurred in conditions "substantially similar" to those in an underground coal mine. Employer contends claimant's duties as a welder did not result in his being regularly exposed to coal mine dust but that his exposure to coal mine dust was only sporadic and incidental and, therefore, insufficient to invoke the Section 411(c)(4) presumption. Employer's Brief at 7-9.

Employer's arguments, in part, mischaracterize the applicable standard for assessing whether conditions at surface mines are substantially similar to those in an underground mine, as well as claimant's burden of proof in establishing qualifying coal mine employment under Section 411(c)(4). Claimant is not required to prove the dust

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v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 12, 35.

[4] Under the Act and the regulations, a miner is defined as any individual who works, or has worked, in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal. 30 U.S.C. §902(d); 20 C.F.R. §§725.101(a)(19), 725.202. The definition also includes any individual who, like claimant, works, or has worked, in coal mine construction or maintenance in or around a coal mine or coal preparation facility. *Id.*

conditions aboveground were identical to those underground, *see* 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013), nor does he "have to prove that [he] was around surface coal dust for a full eight hours on any given day for that day to count." *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 481 (7th Cir. 2001). Claimant need only establish that he was "regularly exposed to coal-mine dust" while working at surface mines. 20 C.F.R. §718.305(b)(2). Moreover, contrary to employer's interpretation of claimant's burden, a miner who worked aboveground at an underground mine need not otherwise establish that the conditions were substantially similar to those in an underground mine. *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058-59 (6th Cir. 2013); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011).

Claimant testified that his work for employer as a metal fabrication welder from 1987 to 2012 occurred either at employer's shop, at underground mine sites, or at coal preparation plants.[5] Hearing Transcript at 11, 17-18. Claimant stated the work day started at the shop and, after receiving work orders, he would depart for the job which "most of the time" occurred at active underground mines or coal preparation plants.[6] *Id.* at 18, 19, 24. At these sites, claimant would fabricate belt structures and rollers used "[t]o pull the coal, all the coal from one spot to another," *id.* at 12, 16; occasionally he would do "some concrete work."[7] *Id.* at 11, 37-39. Claimant confirmed he was regularly working around and breathing in coal mine dust at these locations, *id.* at 19, resulting in the dust getting underneath his clothing and causing "really black" sputum. *Id.* at 20. He stated "[a] lot of times, we built [the belt structure] at the mine site," *id.* at 39, but depending on the job he could also spend a couple of weeks at the shop fabricating the necessary parts for installation at the work sites, during which time he was not exposed to coal dust on a daily

[5] Claimant testified his work for employer included employment in 1988 with JACI General Contractors, from 1989 to 2000 with PJS Farm, and in 2000 with MIKCO, stating that these companies were all related to Ron Stepp Construction and he was doing the same work as when he received pay from Ron Stepp Construction. Hearing Transcript at 24; Director's Exhibit 5.

[6] Claimant stated that "most of the time" the mine sites were at underground coal mines and that "sometimes" the preparation plants were on the same property as the underground mines. Hearing Transcript at 18-19. Claimant added that "usually if we built a belt line," the coal mine was "already running coal" outside and "dumping it on the ground with a scoop or with whatever." *Id.* at 38.

[7] Claimant stated he would also occasionally install canopies at mines that were "sometimes" mining coal and "sometimes not." Hearing Transcript at 39.

basis. *Id*. at 18, 37. Claimant stated ninety-five percent of his work with employer was mining-related and that he spent about twenty percent of that work time at the shop. *Id*. at 50.

The administrative law judge found claimant's "unrebutted testimony"[8] demonstrates he worked at underground coal mines as an outside man, loading coal with an end loader,[9] but mostly for employer as a welder or fabricator constructing coal mine equipment at employer's shop, preparation plants, and underground mines. Decision and Order at 10. The administrative law judge found that claimant "was not exposed to coal dust" during the twenty percent of the time he worked at employer's shop and "it is unclear" as to exactly how much of his other work time he actually spent at underground coal mines and preparation plants. *Id*. Nevertheless, the administrative law judge found claimant's unrefuted testimony "confirmed he was regularly exposed to coal mine dust" in the remainder of his coal mine employment.[10] The administrative law judge thus concluded that, notwithstanding the time claimant spent at employer's shop, he established at least fifteen years of work occurring either aboveground at underground mines or in conditions substantially similar to those in underground mines, i.e., where he was regularly exposed to coal dust. *Id*. at 10. Consequently, the administrative law judge found claimant established the requisite fifteen years of qualifying coal mine employment to invoke the Section 411(c)(4) presumption.

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[8] Employer does not contest the accuracy of claimant's testimony regarding the number of years he worked, his work duties, or that most of his work occurred at underground coal mine sites and preparation plants.

[9] The administrative law judge found claimant was also exposed to coal mine dust in other employment. He found claimant worked in 1982, 1983, and 1986 as a welder for J Scalf performing work similar to that of his job with employer, in 1983 as an outside man and coal loader for 3J Coal, and in 1985 as an outside man and welder for Tug River. Decision and Order at 9.

[10] Employer notes claimant testified that he spent part of his total work time for employer performing tasks at the owner's farm and pouring concrete at other non-mine related work sites. Employer's Brief at 7-9. These statements do not conflict with claimant's estimates that ninety-five percent of his work involved mine-related activities and that twenty percent of that time was performed at employer's shop. *See* Hearing Transcript at 50. Nor has employer produced any evidence that undermines claimant's testimony regarding the percentage of work time he spent on mine-related operations.

Contrary to employer's contentions, the administrative law judge permissibly found, based on claimant's uncontested testimony, that he was regularly exposed to coal mine dust in his job with employer, occurring either aboveground at underground mines or in conditions substantially similar to those in an underground mine. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664 (6th Cir. 2015) (claimant's "uncontested lay testimony" regarding his dust conditions "easily supports a finding" of regular dust exposure); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490 (6th Cir. 2014) (claimant's testimony that the conditions of his employment were "very dusty" was sufficient to establish regular exposure). Therefore, we affirm the administrative law judge's finding that claimant has more than fifteen years of qualifying coal mine employment for purposes of invoking the Section 411(c)(4) presumption.

Because we have affirmed the administrative law judge's finding of at least fifteen years of qualifying coal mine employment, and it is unchallenged that claimant established a totally disabling respiratory or pulmonary impairment under 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. Decision and Order at 25, 28.

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,[11] or that "no part of [his] 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 employer did not rebut the presumption under either prong.

After finding employer disproved clinical pneumoconiosis, the administrative law judge addressed legal pneumoconiosis. Decision and Order at 32-35. To disprove legal pneumoconiosis, employer must establish claimant does not have a chronic lung disease or impairment "arising out of coal mine employment." 20 C.F.R. §718.201(a)(2); *see* 20 C.F.R. §718.203(a) (requiring a miner's pneumoconiosis arise "at least in part out of coal mine employment"); *Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (holding a miner will be deemed to have a lung impairment "significantly related to" coal mine dust exposure, and thus legal pneumoconiosis, "by showing that his disease 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). This definition encompasses any chronic pulmonary disease or respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

caused 'in part' by coal mine employment"); *see also Island Creek Coal Co. v. Young*, No. 19-3113, 2020 WL 284522, at 4 (Jan. 21, 2020) (employer on rebuttal "required to disprove the existence of legal pneumoconiosis by showing [the miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis"). In evaluating whether employer met its burden, the administrative law judge considered the opinions of Drs. Jarboe, Dahhan, and Mettu.[12]

Employer contends the administrative law judge erred in finding that employer did not disprove the existence of legal pneumoconiosis. We disagree. Dr. Jarboe opined claimant does not have legal pneumoconiosis, but suffers from a severe obstructive airways disease, chronic bronchitis, and reactive airways disease due entirely to smoking. Employer's Exhibit 2. Dr. Dahhan similarly opined claimant suffers from a severe obstructive ventilatory impairment due entirely to smoking. Director's Exhibit 24. The administrative law judge discredited their opinions as not well-reasoned and contrary to the regulations and preamble to the 2001 revised regulations. Decision and Order at 32-35.

The administrative law judge permissibly discredited Dr. Jarboe's opinion because he did not adequately explain how he eliminated claimant's coal mine dust exposure as a source of claimant's impairment. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 33-34. Initially, the administrative law judge found Dr. Jarboe relied upon studies indicating that non-smoking miners have shown very minor elevations of residual volume, as a basis to conclude that claimant's elevated residual volume is inconsistent with an obstructive impairment caused by coal mine dust inhalation. Decision and Order at 33-34; Employer's Exhibit 2. Given that the preamble cites studies, which the Department of Labor found credible, concluding that the risks of smoking and coal mine dust exposure may be additive, the administrative law judge permissibly found

[12] Employer generally contends that the administrative law judge applied a more stringent standard by requiring it to exclude coal dust exposure as a cause of claimant's respiratory or pulmonary impairment, rather than establishing that it was more likely than not that claimant's respiratory or pulmonary impairment was not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.305(d)(1)(i)(A); *see* Employer's Brief at 11, 13. Contrary to employer's argument, the administrative law judge permissibly discredited the opinions of Drs. Jarboe and Dahhan based on the flawed rationale each doctor provided for finding that claimant's coal mine dust exposure did not contribute to his impairment. The administrative law judge rejected their opinions and Dr. Mettu's because they were unreasoned, not because of an alleged failure to satisfy a heightened legal standard. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Dr. Jarboe did not adequately explain why claimant's coal mine dust exposure was not a contributing or additive factor, along with cigarette smoking, to his pulmonary impairment. *See* 20 C.F.R. §718.201(a)(2), (b); 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000) (concluding that the risk of clinically significant airways obstruction and chronic bronchitis associated with coal mine dust exposure can be additive with cigarette smoking); *Barrett*, 478 F.3d at 356 (administrative law judge rejected physician's opinion where physician failed to adequately explain why coal dust exposure did not exacerbate claimant's smoking-related impairments); Decision and Order at 34. We therefore affirm the administrative law judge's finding that "Dr. Jarboe's opinion does not assist Employer in affirmatively demonstrating Claimant does not suffer from legal pneumoconiosis." Decision and Order at 35.

We also affirm the administrative law judge's determination that Dr. Dahhan's opinion is entitled to no probative weight because it is not well-reasoned and inconsistent with the Act. Employer generally contends the administrative law judge discredited Dr. Dahhan's opinion "for the same reasons" he discredited the opinions of Drs. Jarboe and Mettu. However, the administrative law judge also discredited Dr. Dahhan's opinion for a separate reason, uncontested by employer: he based his opinion that claimant's impairment was not legal pneumoconiosis on its being purely an obstructive impairment which he opined could not have been caused by coal mine dust exposure.[13] Decision and Order at 32; Director's Exhibit 24. In addition, the administrative law judge concluded that by relying on general statistical averaging for his opinion, Dr. Dahhan failed to adequately address coal dust exposure as a cause or etiology of claimant's disabling severe obstructive lung disease. Thus, the administrative law judge permissibly discredited Dr. Dahhan's opinion for a similar reason he relied on to reject Dr. Jarboe's opinion, i.e., failing to adequately address whether coal dust had an additive effect in claimant's impairment. Consequently, we affirm the administrative law judge's discrediting of Dr. Dahhan's opinion with respect to rebuttal of legal pneumoconiosis.

Employer also argues the administrative law judge erred in finding Dr. Mettu's opinion on legal pneumoconiosis not well reasoned. The administrative law judge found Dr. Mettu's opinion was poorly reasoned because he did not fully explain his reasons for changing his opinion – first in finding claimant's coal mine dust exposure was a significant contributing factor to his impairment, then determining it was no factor at all, and later

[13] We note that the regulation defining legal pneumoconiosis specifically encompasses obstructive impairments, and the preamble to the regulations cites scientific studies on which the Department of Labor based this definition. 20 C.F.R. §718.701(a)(2); 65 Fed. Reg. 79,920, 79,938 (Dec. 20, 2000).

stating it was a minor factor in contributing to his obstructive airways disease.[14] The administrative law judge further found that Dr. Mettu's final opinion that coal dust exposure "has [a] minor impact" did not assist employer in affirmatively demonstrating claimant does not suffer from legal pneumoconiosis. Decision and Order at 32. While employer asserts Dr. Mettu evaluated the entirety of the evidence and his opinion is supported by the objective medical evidence and the opinions of Drs. Jarboe and Dahhan, it challenges neither the specific ground on which the administrative law judge relied to discredit Dr. Mettu's opinion nor the administrative law judge's legal analysis of whether Dr. Mettu's final opinion would support rebuttal. *Id.* (affording the Dr. Mettu's opinion "little to no probative value" as he employed "leaps of logic" and failed to fully explain the reasons for his varying opinions regarding legal pneumoconiosis); *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Consequently, we affirm his determination that Dr. Mettu's opinion was poorly reasoned.

Because the administrative law judge permissibly discredited the opinions of Drs. Jarboe, Dahhan, and Mettu, we affirm his finding that employer failed to establish that claimant does not have legal pneumoconiosis. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We, therefore, affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Moreover, employer raises no separate allegations of error with respect to the administrative law judge's finding that it failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. Decision and Order at 35. We therefore affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption under 20 C.F.R. §718.305(d)(1)(ii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Because claimant invoked the Section 411(c)(4) presumption and employer did not rebut it, claimant has established his entitlement to benefits.

[14] Dr. Mettu diagnosed legal pneumoconiosis in his initial report, but concluded in a supplemental report that claimant's impairment and disability are caused by smoking. Director's Exhibits 20, 26. In a third report based on additional evidence, Dr. Mettu ultimately opined that claimant's obstructive respiratory condition is mostly due to claimant's smoking history, but also that coal dust exposure "has [a] minor impact." Decision and Order at 31-32; Director's Exhibit 29.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge