U.S. Department of Labor

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

BRB No. 19-0096 BLA

BILL WAYNE MABE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
H & P COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 01/28/2020
AMERICAN RESOURCES INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Appeal of the Decision and Order Awarding Benefits of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Thomas L. Ferreri and Matthew J. Zanetti (Ferreri Partners, PLLC), Louisville, Kentucky, for employer/carrier.

Edward Waldman (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2013-BLA-05341) of Administrative Law Judge Peter B. Silvain, Jr., on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on January 23, 2012.[1]

Although the administrative law judge credited claimant with approximately 19.563 years of coal mine employment,[2] he found claimant failed to establish that at least fifteen years took place at underground mines, or in substantially similar surface coal mine employment. He therefore found claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). Turning to whether claimant established entitlement to benefits under 20 C.F.R. Part 718, the administrative law judge found the evidence established legal pneumoconiosis[4] in the form of chronic obstructive pulmonary disease

[1] Claimant filed an initial claim on September 18, 1989. Director's Exhibit 1. An administrative law judge denied the claim on February 25, 1992 because claimant failed to establish a totally disabling pulmonary or respiratory impairment. *Id.* The Board affirmed the administrative law judge's denial of benefits. *Mabe v. H&P Coal Co.*, BRB No. 92-1329 BLA (Dec. 30, 1993) (unpub.). Claimant filed a second claim on May 7, 2002. Director's Exhibit 2. The district director denied the claim on November 13, 2003 because claimant did not establish total disability. *Id.*

[2] The record reflects that claimant's last coal mine employment occurred in Kentucky. Director's Exhibit 5. 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).

[3] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment

(COPD)/emphysema due to coal mine dust exposure and cigarette smoking. 20 C.F.R. §§718.202(a), 718.201(b). Finally, he found claimant was totally disabled due to legal pneumoconiosis,[5] 20 C.F.R. §718.204(b), (c), and awarded benefits.

On appeal, employer argues the administrative law judge lacked authority to decide the case because he had not been appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[6] Employer also contends the administrative law judge erred in crediting claimant with 19.563 years of coal mine employment. It further argues the administrative law judge erred in finding the medical opinion evidence established legal pneumoconiosis. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds that the administrative law judge had authority to decide the case. The Director also responds in support of the administrative law judge's finding of legal pneumoconiosis. In a reply brief, employer reiterates its previous contentions.[7]

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significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[5] Because the administrative law judge found the new evidence established total disability, he found that claimant established a change in the applicable condition of entitlement. 20 C.F.R. §§718.204(b), 725.309(c).

[6] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[7] We affirm, as unchallenged on appeal, the administrative law judge's finding of a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore also affirm the administrative law judge's finding of a change in an applicable condition of entitlement. *Id.*; 20 C.F.R. §725.309(c).

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits 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, 362 (1965).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing the elements of entitlement, but failure to establish any of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Appointments Clause

Employer urges the Board to vacate the administrative law judge's decision and remand the case for assignment to a different, constitutionally appointed administrative law judge for a new hearing pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). We agree with the Director that employer forfeited its Appointments Clause argument by failing to raise it when the case was before the administrative law judge. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (citation omitted); *Powell v. Serv. Employees Int'l, Inc.*, BRBS , BRB No. 18-0557 (Aug. 8, 2019).

Lucia was decided four months before the administrative law judge issued his Decision and Order Awarding Benefits, but employer failed to raise its arguments while the claim was before the administrative law judge. At that time, the administrative law judge could have addressed employer's arguments and, if appropriate, taken steps to have the case assigned for a new hearing before a new administrative law judge. *See Kiyuna v. Matson Terminals, Inc.*, BRBS , BRB No. 19-0103 at 4 (June 25, 2019). Instead, employer waited to raise the issue until after the administrative law judge issued an adverse decision. Because employer has not raised any basis for excusing its forfeiture of the issue, we reject its argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different administrative law judge.

Legal Pneumoconiosis

Employer argues the administrative law judge erred in finding the medical opinion evidence established legal pneumoconiosis. Employer initially argues the administrative law judge failed to properly address the length of claimant's coal mine employment, thereby potentially affecting the weight accorded the medical opinion evidence. Employer's Brief at 11-12. We disagree.

Claimant bears the burden of proof to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence in the record. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

Employer initially argues the administrative law judge erred in relying on claimant's testimony to credit him with four years of coal mine employment with Bert Engle from 1956 to 1960 without addressing the significance of this employment not being reflected on claimant's Social Security Administration (SSA) Earnings Statement. Employer's Brief at 12. We disagree. While SSA records provide important information regarding the work history of a miner, evidence of additional employment, such as a miner's testimony, is also relevant and probative. *See Hutnick v. Director, OWCP*, 7 BLR1-326, 1-329 (1984); *see* 20 C.F.R. §725.101(a)(32)(ii) ("dates and length of employment may be established by any credible evidence including . . . sworn testimony"). During an August 3, 2016 deposition, claimant testified that this employment for Bert Engle is not listed on his SSA Earnings Statement because Bert Engle paid him in cash. Employer's Exhibit 12 at 15-16. The administrative law judge found claimant's uncontradicted testimony credible.[8] Decision and Order Awarding Benefits at 7. It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See 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). As a miner's credible, uncontradicted testimony may be used to establish the nature and length of his employment, we affirm the administrative law judge's decision to credit claimant with four years of coal mine employment from 1956 to 1960. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664-65 (6th Cir. 2015); *Wensel v. Director, OWCP*, 888 F.2d 14, 17 (3d Cir. 1989); *Tackett v.*

[8] The administrative noted claimant's testimony is consistent with the information he provided on his CM-911 Employment History forms. Decision and Order Awarding Benefits at 7; Director's Exhibits 2, 5.

Cargo Mining Co., 12 BLR 1-11, 1-14 (1988); *Bizarri v. Consolidation Coal Co.*, 7 BLR 1-343, 1-344-345 (1984); *Hutnick*, 7 BLR at 1-329.

Employer also contends the administrative law judge erred in crediting claimant with 0.813 year of coal mine employment in 1986 and 0.5 year of coal mine employment in 1988. Employer's Brief at 11-12. We disagree. The administrative law judge addressed whether the record established that claimant had 125 working days within each of those calendar years. Decision and Order Awarding Benefits at 8. He divided claimant's yearly earnings, as reflected in his SSA earnings statement, by the average daily earnings for coal miners for each year as set forth in Exhibit 610 of the Black Lung Benefits Act Procedure Manual. *Id*. Based on this analysis, the administrative law judge found claimant had 101.6 working days in 1986. *Id*. Dividing this figure by 125 days, he credited claimant with 0.813 year of coal mine employment. *Id*. Contrary to employer's argument, the administrative law judge based his finding on a reasonable method of computation.[9] *See Shepherd*, 915 F.3d at 401 (miner can be credited with a year of coal mine employment, or a fraction thereof, based on 125 working days); *Muncy*, 25 BLR at 1-27; *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986). Although the administrative law judge found claimant worked at least 125 days in 1988, he credited claimant with half of a year because claimant testified he only worked through June of 1988. Employer has not shown error in this finding. Any error by the administrative law judge in not applying *Shepherd* to credit claimant with a full year of employment based on 125 working days would undercount claimant's employment and therefore would be harmless. *Shepherd*, 915 F.3d at 401. Because employer raises no other objections, we affirm the administrative law judge's finding of 19.563 years of coal mine employment.

In order to establish legal pneumoconiosis, claimant must prove that he had a "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). Although claimant has the burden to establish legal pneumoconiosis, 20 C.F.R. §718.201(b), the administrative law judge accurately noted he can satisfy that burden by showing his lung disease or impairment was caused "in part" by coal mine

[9] In *Shepherd*, the Sixth Circuit held that a claimant need not establish a full calendar year employment relationship under 20 C.F.R. §725.101(a)(32)(iii). *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402-05 (6th Cir. 2019), *reh'g denied*, No. 17-4313 (6th Cir. May 3, 2019). Rather, if the result of the formula "yields at least 125 working days, the miner can be credited with a year of coal mine employment, regardless of the actual duration of employment for the year." *Id*. at 402. If the results yield less than 125 days, "the miner still can be credited with a fractional portion of a year based on the ratio of the days worked to 125." *Id*.

employment. *See Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (claimant can satisfy his burden to prove that his impairment was "significantly related to, or aggravated by, exposure to coal dust" by showing that his disease was caused "in part" by coal mine employment); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311-12 (4th Cir. 2012) (doctor's opinion that lung disease arose from "a combination of" coal mine dust exposure and smoking sufficient to establish legal pneumoconiosis); Decision and Order Awarding Benefits at 37.

The administrative law judge considered the opinions of Drs. Baker, Rosenberg and Jarboe. Dr. Baker diagnosed legal pneumoconiosis in the form of COPD/emphysema due to coal mine dust exposure and cigarette smoking. Director's Exhibits 13, 32; Employer's Exhibit 9. Drs. Rosenberg and Jarboe, however, opined claimant's COPD/emphysema was due cigarette smoking and asthma, and was not related to coal mine dust exposure. Employer's Exhibits 5, 6, 11, 14.

The administrative law judge accorded less weight to the opinions of Drs. Rosenberg and Jarboe because they did not adequately explain why claimant's coal mine dust exposure was not a factor in causing his COPD/emphysema. Decision and Order Awarding Benefits at 43. Conversely, the administrative law judge found Dr. Baker's opinion reasoned and entitled to probative weight. *Id.* He therefore found the medical opinion evidence established legal pneumoconiosis. *Id.*

Employer argues that Dr. Baker's characterization of the contribution of claimant's coal mine dust exposure to his COPD/emphysema as "itty-bitty" is not sufficient to support a finding of legal pneumoconiosis. However, as the Director accurately notes, the administrative law judge found that Dr. Baker's April 20, 2016 deposition testimony, characterizing the contribution of claimant's coal mine dust exposure as "itty-bitty," was in response to a question regarding the relative contributions of coal mine dust exposure and cigarette smoking. Director's Brief at 10-11; Decision and Order Awarding Benefits at 38; Employer's Exhibit 9 at 63-64. As the administrative law judge noted, Dr. Baker subsequently opined in an April 9, 2017 medical report that while claimant's COPD/emphysema was significantly related to his cigarette smoking, it was also "related" to his significant coal mine dust exposure. Decision and Order Awarding Benefits at 38; Director's Exhibit 32 at 4. Dr. Baker cited to medical literature supportive of his opinion that coal mine dust exposure is a cause of COPD and asserted that Drs. Rosenberg and Jarboe failed to explain how they discounted claimant's coal mine dust exposure as a contributing factor to claimant's emphysema. *Id.* In crediting Dr. Baker's opinion, the administrative law judge found it consistent with the position of the Department of Labor that the effects of smoking and coal dust exposure are additive. 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); Decision and Order Awarding Benefits at 38 n.108.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012). Because it is based on substantial evidence, we affirm the administrative law judge's determination that Dr. Baker's opinion is sufficient to satisfy claimant's burden of proof to establish legal pneumoconiosis. *See Groves*, 761 F.3d at 598-99; *Island Creek Coal Co. v. Young*, F.3d , No. 19-3113, 2020 WL 284522, at 10 (6th Cir. Jan. 21, 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'"). Because employer does not allege any additional error, we affirm the administrative law judge's finding that claimant has legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.201(b).

Because employer does not challenge the administrative law judge's finding that the evidence establishes that claimant's total disability is due to pneumoconiosis at 20 C.F.R. §718.204(c), this finding is also affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-1710, 1-711 (1983).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge