U.S. Department of Labor

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

BRB No. 19-0135 BLA

JOHNNY DOYLE MOWERY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GEM STONE COAL, INCORPORATED	)	DATE ISSUED: 01/31/2020
	)	
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 Awarding Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

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

Sarah M. Hurley (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: ROLFE, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-BLA-05199) of Administrative Law Judge Scott R. Morris 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 miner's subsequent claim filed on January 22, 2016.[1]

The administrative law judge determined employer is the responsible operator and accepted the parties' stipulation that claimant has twenty-one years of underground coal mine employment. He found the new evidence established total disability and 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 employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge erred in determining it is the responsible operator and that it did not rebut the Section 411(c)(4) presumption.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers'

[1] This is claimant's second claim for benefits. On July 6, 2000, the district director denied his first claim, filed on November 1, 1999, because claimant did not establish any element of entitlement. Director's Exhibit 1.

[2] Under Section 411(c)(4) of the Act, claimant 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.

[3] Employer generally asserts that Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and "[30 U.S.C.] §932(*l*)" are not applicable to this case because "[S]ection 1556 of the Affordable Care Act, Pub. Law 111-148, reviving these provisions, violates Article II of the Constitution." Employer's Brief at 2. We decline to address this issue, as employer makes no specific supporting arguments. *See* 20 C.F.R. §802.211; *Sarf v. Director*, OWCP, 10 BLR 1-119 (1987). Moreover, Section 932(*l*) is not applicable to this case as this is a living miner's claim. Accordingly, we affirm the administrative law judge's application of the Section 411(c)(4) presumption in this case. *See* Decision and Order at 16.

Compensation Programs (the Director), responds in support of the administrative law judge's identification of employer as the responsible operator.[4]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's decision and order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Responsible Operator

The responsible operator is the "potentially liable operator" that most recently employed claimant as a miner for at least one year.[6] *See* 20 C.F.R. §§725.494, 725.495(a)(1). A "miner" is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. §902(d); 20 C.F.R. §725.101(a)(19). The regulations provide "a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner." 20 C.F.R. §725.202(a). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this cases arises, has held that duties that meet situs and function requirements constitute the work of a miner as defined in the Act. *See Navistar, Inc. v. Forester*, 767 F.3d 638, 641 (6th Cir. 2014); *Director, OWCP v. Consolidation Coal Co.*

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, a totally disabling respiratory impairment, 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 6, 14. Claimant, therefore, established a change in an applicable condition of entitlement as a matter of law. *See* 20 C.F.R. §725.309(c).

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1 at 249.

[6] An employer must meet five criteria to be considered a potentially liable operator: The miner must have worked for the operator for a cumulative period of at least one year; the miner's employment must have included at least one working day after December 31, 1969; the miner's disability or death must have arisen out of his or her employment with the operator; the operator must have been an operator after June 30, 1973; and the operator must be capable of assuming liability for the payment of benefits, through its own assets or insurance. 20 C.F.R. §725.494(a)-(e).

[*Petracca*], 884 F.2d 926, 929-30 (6th Cir. 1989). Under the situs requirement, the work must take place in or around a coal mine or coal preparation facility,[7] while under the function requirement, the miner must have been employed in the extraction or preparation of coal. *Forester*, 767 F.3d at 641.

The relevant evidence in this case consists of claimant's description of his coal mine employment on Department of Labor forms and his testimony. In his prior claim, claimant reported he worked as a night watchman for employer for four years and indicated his duties included greasing end loaders, shovel/sweeping office buildings, cleaning belt heads, retrieving oxygen tanks, and putting water in batteries. Director's Exhibit 1-336. He also testified employer required him to "look after" power centers and stated that he had been fired for refusing to shovel belt heads. Director's Exhibit 1-243, 1-245.

In the present claim, claimant reported that his duties as a night watchman involved driving a truck "around the mines and mak[ing] sure everything was alright." Director's Exhibit 5. Claimant then testified that approximately ninety percent of his shift involved traveling from mine to mine in a pickup truck, walking the property, and ensuring the mine fans were running. Hearing Transcript at 26, 30-31, 34-35. For the remaining ten percent of his shift, he stated he would perform various tasks, including: checking the windows and doors; cleaning dust off the end loaders and in the mine offices; moving supplies; retrieving a bottle of oxygen from the tipple for repairmen working on the continuous miner; sorting bolts; driving a loader to the tipple so they could dump coal into a trailer; removing "skirts" around a conveyer; running coal while sitting at the belt head and moving a "flapper" to separate the rock from the coal as it exited the belt. *Id*. at 26, 29, 30, 32-34. Claimant testified he performed these tasks as they arose, which occurred from once a week to once a month. *Id*. at 32-34.

The administrative law judge reviewed this evidence and found claimant's "unrebutted assertions" established he spent ninety percent of his four years with employer working as a night watchman. Decision and Order at 8. He further determined employer "used claimant as a general laborer for the remaining [ten percent] of his time, with the majority of this work being integral labor to the process of coal extraction." *Id*. The administrative law judge concluded claimant satisfied the function requirement for his entire tenure with employer and employer was the properly designated responsible operator. *Id*.

Employer argues that the administrative law judge erred in finding it employed claimant as a miner as he was not "regularly engaged" in the duties of a general laborer,

[7] Employer concedes claimant's work satisfies the situs requirement. Employer's Brief at 6.

but performed them "at most . . . on three or four occasions."[8] Employer's Brief at 7. We disagree. The administrative law judge acknowledged claimant worked as a general laborer "only sporadically, on an 'as needed' basis." Decision and Order at 8. He rationally concluded, however, claimant's uncontradicted testimony established that "like the night watchman in *Sammons* [*v. EAS Coal Co.*, 980 F.2d 731 (Table)], a significant portion of [claimant's] duties" was integral to the process of coal extraction and, therefore, constituted the work of a miner.[9] Decision and Order at 8; *see Griffith v. Director, OWCP*, 868 F.2d 847, 849 (6th Cir. 1989) (improper to subtract part of each shift the miner functioned solely as a night watchman in calculating coal mine employment); *see also Keifer v. Holt Cargo Systems, Inc.*, BRB No. 96-1059 (April 28, 1997) (tractor trailer driver who spent five percent of his time engaged in maritime activity is covered under the Longshore and Harbor Workers' Compensation Act because although it was infrequent, the maritime activity was a regular part of his overall duties). Based on this finding and the lack of evidence from employer rebutting the presumption that claimant is a miner, we affirm the administrative law judge's conclusions that claimant satisfied the function requirement and that employer is the properly designated responsible operator. 20 C.F.R. §§725.202(a); 725.494, 725.495; *see Forester*, 767 F.3d at 641; Decision and Order at 8.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish the miner had neither legal nor clinical pneumoconiosis,[10] or "no part

[8] We affirm, as unchallenged by employer on appeal, the administrative law judge's finding that claimant's duties as a general laborer constituted work essential to the extraction and production of coal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 8.

[9] In *Sammons*, the Sixth Circuit held that a private security guard was a miner because, in addition to patrolling the mine site and monitoring health and safety issues each shift, he repaired and replaced pipes and pumps activities "vital and essential to the production and extraction of coal." *Sammons v. EAS Coal Co.*, 980 F.2d 731, 732 (Table), 1992 WL 348976 at 2 (6th Cir. Nov. 24, 1992) (unpub.). The administrative law judge contrasted *Sammons* with *Falcon Coal Co. v. Clemons*, 873 F.2d 916, 922 (6th Cir. 1989), a decision in which the Sixth Circuit held that a night watchman who sat in a guardhouse and occasionally drove around the mine was not a miner. Decision and Order at 7, 8.

[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

of the miner's 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 employer failed to establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, employer must establish claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The Sixth Circuit has held that this standard requires employer to "disprove the existence of legal pneumoconiosis by showing that [claimant's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, F.3d , No. 19-3113, 2020 WL 284522 at 4 (6th Cir. Jan 21, 2020). The administrative law judge determined that employer rebutted clinical pneumoconiosis, but did not rebut legal pneumoconiosis. Decision and Order at 21.

The administrative law judge considered Dr. Rosenberg's opinion that claimant does not have legal pneumoconiosis, but has an obstructive impairment/emphysema due to smoking and unrelated to coal dust exposure.[11] Decision and Order at 19-21; Employer's Exhibit 4. Finding his opinion not well-reasoned and contrary to the preamble to the 2001 regulatory revisions, the administrative law judge determined employer failed to disprove legal pneumoconiosis. Decision and Order at 21.

We reject employer's contention the administrative law judge erred in discrediting Dr. Rosenberg's opinion. Employer's Brief at 4-5. Dr. Rosenberg opined that when coal mine dust exposure causes obstruction, the general pattern is a reduced FEV1 with a corresponding reduction of the FVC, preserving the FEV1/FVC ratio. Employer's Exhibit 4 at 3. Due to the "extreme decline" in claimant's FEV1/FVC ratio, Dr. Rosenberg concluded cigarette smoking, not coal mine dust exposure, caused claimant's impairment. *Id*. The administrative law judge permissibly discredited this portion of Dr. Rosenberg's

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 also considered Dr. Everhart's opinion that claimant has legal pneumoconiosis in the form of airway obstruction, diffusion abnormality, and chronic bronchitis due to coal mine dust exposure and cigarette smoking. Decision and Order at 18; Director's Exhibit 12. He found Dr. Everhart's opinion merited little weight, as it contained no supporting reasoning. Decision and Order at 18.

opinion because his reasoning conflicts with the Department of Labor's recognition that coal mine dust exposure can cause clinically significant obstructive disease as shown by a reduction in the FEV1/FVC ratio. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); Decision and Order at 18-19. He also noted Dr. Rosenberg relied on a reduced diffusion capacity and marked air trapping to support his opinion that claimant's respiratory impairment is representative of a diffuse form of emphysema related to smoking, rather than coal mine dust exposure. Decision and Order at 20; Employer's Exhibit 4 at 6-9. The administrative law judge permissibly found, however, that even if Dr. Rosenberg's assertions are correct, he did not adequately explain why "[c]laimant's emphysema was not 'substantially aggravated' by his exposure to coal mine dust." Decision and Order at 20; 20 C.F.R. §§718.201(b); 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8.

Because substantial evidence supports the administrative law judge's discrediting of Dr. Rosenberg's opinion, we affirm his finding that employer failed to establish claimant does not have legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A). Because employer must rebut both types of pneumoconiosis, this finding precluded employer from rebutting the presumption at 20 C.F.R. §718.305(d)(1)(i), despite the administrative law judge's determination employer rebutted clinical pneumoconiosis. Decision and Order at 17, 21.

Disability Causation

The administrative law judge next considered whether employer established that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. Decision and Order at 22-23; 20 C.F.R. §718.305(d)(1)(ii). Contrary to employer's contention, the administrative law judge rationally discounted Dr. Rosenberg's opinion that claimant's disability is not due to pneumoconiosis because the physician did not diagnose legal pneumoconiosis, contrary to his finding.[12] *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 22. Therefore, we affirm the administrative law judge's determination employer failed to rebut the presumed fact that claimant is totally disabled due to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

[12] Dr. Rosenberg did not express an opinion on disability causation independent or his belief that claimant did not have legal pneumoconiosis. *See* Employer's Exhibit 4.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge