U.S. Department of Labor

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

BRB No. 16-0557 BLA

VICKIE S. SALYERS[1] (o/b/o LOWELL E. SALYERS, deceased) Claimant-Respondent v. KENWEST TERMINALS LLC Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	))))))))))))))))	 DATE ISSUED: 07/18/2017 DECISION and ORDER

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

Mark J. Grigoraci (Robinson & McElwee PLLC), Charleston, West Virginia, for employer.

Kathleen H. Kim (Nicholas C. Geale, Acting Solicitor of Labor; Maia 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: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

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[1] The miner died on July 9, 2013. Claimant, the miner's widow, is pursuing the miner's claim on his behalf. *See* Decision and Order at 2.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits of Administrative Law Judge Peter B. Silvain, Jr., rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012). This case involves a miner's claim filed on March 3, 2009.

The administrative law judge credited the miner with 21.75 years of qualifying coal mine employment and found that he had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge thus determined that the miner 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. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in crediting the miner with fifteen years of qualifying coal mine employment and, thus, erred in finding that the miner invoked the Section 411(c)(4) presumption. Further, employer argues that the administrative law judge erred in finding that employer did not rebut the presumption. Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, contending that the administrative law judge properly credited the miner with sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption.[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.[4] 33 U.S.C. §921(b)(3), as incorporated into the

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had a totally disabling respiratory impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 18-19.

[4] The record reflects that the miner's coal mine employment was in Kentucky. Decision and Order at 7, 11; Director's Exhibit 2. Accordingly, this case arises within

Act 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 Qualifying Coal Mine Employment

In finding that claimant established sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption, the administrative law judge credited the miner with 21.75 years of employment with KenWest and its predecessors (KenWest or employer), when the miner worked at a coal loading dock on a river. Decision and Order at 6-9; Director's Exhibit 37 (Hearing Tr.) at 59-61, 70-75. Relying on the miner's testimony that his duties involved crushing, sizing, and mixing raw coal before loading it onto a barge for shipment, the administrative law judge determined that the miner's work constituted coal preparation and, thus, was that of a "miner" under the Act. Decision and Order at 7-8; Director's Exhibit 37 (Hearing Tr.) at 82-85, 92-96. Therefore, the administrative law judge determined that the miner had sufficient coal mine employment for purposes of invoking the Section 411(c)(4) presumption.

Employer challenges the administrative law judge's finding that the miner's work for employer constituted covered coal mine employment under the Act. Employer's Brief at 8-11. Specifically, employer asserts that the miner did not work in or around a coal mine, and was not involved in extracting coal from a mine. Rather, employer contends, the miner was "merely involved in transporting coal that was delivered from an off-site mine and then loaded onto coal barges for delivery to the ultimate purchaser and consumer." *Id.* at 10. We disagree.

Under the Act, 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); *see* 20 C.F.R. §§725.101(a)(19), 725.202(a). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has adopted a situs-function test in determining whether an individual is a "miner" under the Act. *Director, OWCP v. Consolidation Coal Co.*, [*Petracca*], 884 F.2d 926, 931, 13 BLR 2-38, 2-41-42 (6th Cir. 1989). The situs portion of the test requires that a person's work occur in or around a coal mine or coal preparation facility. *Id.* An individual meets the function requirement if his work was necessary and integral to the extraction or

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the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

preparation of coal. *Id*. The administrative law judge found that the miner's employment with KenWest satisfied both requirements.

Contrary to employer's contention, the administrative law judge rationally concluded that the coal with which the miner worked was in the preparation and processing stage. Decision and Order at 8. As summarized by the administrative law judge, the miner testified that raw coal was trucked to the coal loading dock from various mines. Decision and Order at 4-6, 7-8; Director's Exhibit 37 (Hearing Tr.) at 82-83, 95. Once the coal arrived at the dock site, the miner worked at crushing and sizing the coal, busting up coal lumps to facilitate processing through a feeder, mixing coal to make different blends, and then loading coal onto barges for shipment. Decision and Order at 4-6, 17; Director's Exhibit 37 (Hearing Tr.) at 82-85, 92-95.

The administrative law judge initially found that the miner's description of his duties at KenWest was consistent with the regulatory definition of "coal preparation" as including the "breaking, crushing, sizing . . . mixing . . . and loading" of coal. 20 C.F.R. §725.101(a)(13); Decision and Order at 7. Further, the administrative law judge permissibly credited the miner's testimony that he regularly performed each of these duties for KenWest, and that he crushed and sized coal every day. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) (credibility determinations are for the administrative law judge); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Mabe v. Bishop Coal Co.,* 9 BLR 1-67, 1-68 (1986); Decision and Order at 7-8; Director's Exhibit 37 (Hearing Tr.) at 82-85, 92-95. In light of these determinations, we agree with the Director that the administrative law judge rationally concluded that the miner's work was an integral or necessary part of the coal extraction or preparation process.[5] *See Southard v. Director,*

[5] Despite its assertion that the miner was "merely involved in transporting coal," employer concedes that the miner's duties included crushing the bigger lumps of coal in order to size the coal, mixing different blends of coal, and loading the coal onto barges for delivery. Employer's Brief at 9-10. Moreover, employer's reliance on *Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984) and *Eplion v. Director, OWCP*, 794 F.2d 935, 9 BLR 2-52 (4th Cir. 1986) to argue that loading coal onto barges at a terminal or coal loading facility is not coal mine employment, is misplaced. Employer's Brief at 10-11. In contrast to the instant case, in both *Southard* and *Eplion* the coal was already processed and prepared for market when it arrived at the terminal to be loaded onto delivery trucks or deposited in storage piles. *See Southard*, 732 F.2d at 69, 6 BLR at 2-31 (work was not that of a miner because coal was already prepared and in commerce upon its arrival at the retailers' facilities); *Eplion*, 794 F.2d at 937, 9 BLR at 2-56 (work was not that of a miner because coal had already been processed and prepared for market before workers had any contact with it).

OWCP, 732 F.2d 66, 69, 6 BLR 2-26, 2-30 (6th Cir. 1984) (describing the work of preparing coal); Decision and Order at 6-8; Director's Brief at 4-5.

We further reject employer's contention that the miner's work did not constitute "coal mine employment for federal black lung purposes" because he did not work "in or around an underground or above ground coal mine." Employer's Brief at 10. As the Director correctly contends, the definition of a miner also includes a person who works in or around a coal preparation facility. 30 U.S.C. §902(d); *see* 20 C.F.R. §§725.101(a)(19), 725.202(a); *see Petracca*, 884 F.2d at 931, 13 BLR at 2-41-42; Director's Brief at 5. Having determined that the miner's duties involved the preparation and processing of coal, the administrative law judge reasonably concluded that the coal loading dock where the miner's duties were performed constituted a coal preparation facility. 20 C.F.R. §§725.101(a)(12), (19), 725.202(a); *see Southard,* 732 F.2d at 69, 6 BLR at 2-31 (acknowledging that a "coal mine" is basically defined by the work that is performed); Decision and Order at 8; Director's Brief at 5, *citing Kinder Morgan Operating L.P. "C." v. Chao*, 78 F. App'x 462 (6th Cir 2003) (river terminal that mixes, stores, and loads coal engages in coal preparation).

We, therefore, affirm the administrative law judge's finding that the miner's work for KenWest constituted covered coal mine employment. We further affirm, as unchallenged, the administrative law judge's finding that all of the miner's coal mine employment took place in conditions that were substantially similar to conditions in an underground mine. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17. Consequently, we affirm the administrative law judge's finding that the miner had 21.75 years of qualifying coal mine employment.

In view of our affirmance of the administrative law judge's findings that the miner had over fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment, we further affirm the administrative law judge's determination that the miner invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4) (2012).

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

Because the miner invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[6] 20

[6] "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

C.F.R. §718.305(d)(1)(i), or 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)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

After finding that employer rebutted the existence of clinical pneumoconiosis, the administrative law judge considered the evidence relevant to the existence of legal pneumoconiosis. Decision and Order at 22. The administrative law judge noted that the miner's treatment records from July 1, 2005 through April 29, 2009 document the miner's evaluation and treatment for chest pain, chronic obstructive pulmonary disease (COPD), emphysema, and lung cancer, which necessitated the removal of his left lung on March 6, 2009. Director's Exhibits 11 at 75-79, 149, 152, 154, 158, 190; 12. The administrative law judge also considered letters dated October 9, 2009 and September 9, 2011 from Dr. Thorarinsson, a treating physician, and an October 3, 2011 report from Dr. Gaziano. Decision and Order at 13; Director's Exhibits 13, 33. Noting that legal pneumoconiosis can encompass both COPD and emphysema arising out of coal mine employment, and that neither Dr. Thorarinsson nor Dr. Gaziano addressed claimant's COPD and emphysema, the administrative law judge found that their opinions were not sufficient to disprove the existence of legal pneumoconiosis. Decision and Order at 20, 22, *citing* 20 C.F.R. §718.201(a)(2), (b). Therefore, the administrative law judge found that employer did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).

Employer asserts that the administrative law judge erred in discrediting the opinion of Dr. Gaziano.[7] Employer's Brief at 13-15. Employer asserts that "[s]imply

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mine employment." 20 C.F.R. §718.201(b). "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).

[7] Employer asserts that, contrary to the administrative law judge's finding, Dr. Thorarinsson addressed the miner's chronic obstructive pulmonary disease (COPD) and emphysema in his August 24, 2009 report. Employer's Brief at 3-4. Employer apparently concedes, however, that the administrative law judge permissibly discredited his opinion relevant to the existence of legal pneumoconiosis. Employer's Brief at 15-16. Specifically, employer contends that Dr. Gaziano's opinion is "the only credible medical opinion on whether the miner ha[d] legal pneumoconiosis," and that Dr. Thorarinsson's opinion is "equivocal and unsupported by the medical evidence." *Id.* at 13, 16. We,

because Dr. Gaziano did not use the magic words 'COPD' or 'emphysema' when discussing whether the miner's respiratory condition was related in any way to coal dust exposure does not mean that he failed to address whether the miner's 'COPD' or 'emphysema' was related in any way to coal dust exposure." *Id.* at 14, *citing Westmoreland Coal Co. v. Amick*, 123 F. App'x. 525, 532 (4th Cir. 2004). Employer's argument lacks merit.

As fact-finder, the administrative law judge need not accept any particular medical opinion, but must determine whether a party has met its burden, based upon a rational assessment of the credibility of the evidence submitted. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); *Groves*, 277 F.3d at 836, 22 BLR at 2-325. Here, as claimant successfully invoked the presumption that the miner's total disability was due to pneumoconiosis, the burden of proof shifted to employer to *affirmatively* refute that presumed fact. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011) ("rebuttal requires an *affirmative showing* . . . that [the miner] does not suffer from pneumoconiosis, or that the disease is not related to coal mine work").

Considering the evidence under this standard, the administrative law judge noted that Dr. Gaziano considered a coal mine employment history of thirteen years and noted that the miner was a "very heavy smoker" who developed lung cancer requiring removal of his left lung. Decision and Order at 13. While Dr. Gaziano acknowledged that the miner's treatment notes contained diagnoses of COPD and emphysema, relevant to the existence of pneumoconiosis Dr. Gaziano simply stated:

> I do not see any evidence where coal workers' pneumoconiosis was present or even caused or contributed to [the miner's] present respiratory status. The lung cancer was not caused nor contributed to by his coal dust exposure. The amount of coal dust exposure would have been extremely

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therefore, affirm, as unchallenged on appeal, the administrative law judge's determination that Dr. Thorarinsson's opinion is not sufficient to rebut the presumed existence of legal pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 22-23. Consequently the administrative law judge's error, if any, in failing to specifically address Dr. Thorarinsson's August 24, 2009 report relevant to the existence of legal pneumoconiosis, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

> limited by only thirteen years at the surface and coal loading docks.[[8]] This was also established by the lack of chest x-ray findings or postoperative histopathological findings of evidence of coal workers' pneumoconiosis.

Director's Exhibit 33 at 5. Because employer must affirmatively disprove the presumed existence of legal pneumoconiosis, which has been recognized by the Department of Labor as including COPD and emphysema due to coal dust exposure, the administrative law judge permissibly found that Dr. Gaziano's opinion does adequately address the etiology of the miner's COPD and emphysema and, therefore, does not support employer's burden on rebuttal.[9] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000); *Morrison*, 644 F.3d at 479-80, 25 BLR at 2-8-9; Decision and Order at 22-23. As it is supported by substantial evidence, this

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[8] We note that contrary to Dr. Gaziano's characterization, the administrative law judge found that the miner had 21.75 years of coal mine employment in dust conditions that were substantially similar to those in an underground mine. Decision and Order at 17.

[9] We reject employer's contention that, pursuant to *Westmoreland Coal Co., v. Amick*, 123 F. App'x. 525, 532 (2004), Dr. Gaziano's opinion sufficiently addresses the cause of the miner's COPD and emphysema. Employer's Brief at 14. Employer contends, correctly, that a physician's opinion "that there is 'no evidence of coal workers' pneumoconiosis, nor any dust disease of the lungs' does address whether the miner's COPD (or other lung disease) is related to coal dust exposure." Employer's Brief at 14, *quoting Amick*, 123 F. App'x. at 532. Employer's reliance on *Amick*, however, is misplaced as the facts of *Amick* are distinguishable from those in this case. In *Amick* the court observed that while the physicians may not have specifically addressed the miner's COPD, each emphasized that the miner did not suffer from *any* coal mine dust-related disease or impairment, e.g., "there is no evidence of coal workers' pneumoconiosis, nor any dust disease of the lungs in this case" and "these findings are not in keeping with coal mine dust induced lung disease." *Amick*, 123 F. App'x. at 532. Thus, the court concluded, the administrative law judge's finding that the doctors failed to discuss the etiology of the miner's COPD, and did not address legal pneumoconiosis was "simply incorrect." *Id.* at 533. Here, while Dr. Gaziano opined that there is no evidence of coal workers' pneumoconiosis, and that the miner's lung cancer was not due to coal dust exposure, he did not address whether the miner suffered from *any* dust-related disease of the lungs.

finding is affirmed.[10] *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

Employer raises no further challenge to the administrative law judge's weighing of the medical opinions relevant to the existence of legal pneumoconiosis.[11] We, therefore, affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption by establishing that the miner did not have legal pneumoconiosis and, thus, did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(2)(i). *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

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[10] Employer additionally asserts that the administrative law judge "erroneously reduced" the miner's smoking history to 56.25 years, and should have found "at least" a 70 pack year history, as noted by Dr. Gaziano. Employer's Brief at 16-17; Director's Exhibit 33 at 4. We need not address this argument, however, as the administrative law judge did not reject Dr. Gaziano's medical opinion on the ground that the physician relied on an inaccurate smoking history. *See Larioni,* 6 BLR at 1-1278.

[11] It is not clear from employer's brief whether employer intends to assert that the administrative law judge failed to consider Dr. Thorarinsson's August 24, 2009 report regarding the existence of legal pneumoconiosis and that the alleged failure requires remand on that issue. Regardless, the point is moot because the report does not aid employer in meeting its burden on rebuttal. In order to establish that the miner's COPD is not legal pneumoconiosis, employer has to establish by a preponderance of affirmative evidence that the COPD is not "significantly related to, or substantially aggravated by, dust exposure." 20 C.F.R. §718.305(d)(1)(i); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-153 n.8 (2015) (Boggs, J., concurring and dissenting). In response to a direct question whether the miner has any such condition, Dr. Thorarinsson stated simply, "Prob. Not." The report does not contain any other information relevant to the existence of legal pneumoconiosis. Putting aside the fundamental issue of whether such a bare and equivocal response could even be considered facially sufficient to meet employer's burden, which the employer does not address, the report is not credible because, on its face, it is neither documented nor reasoned. 65 Fed. Reg. 79,920, 79,948 (Dec. 20, 2000) (a physician provides a "documented and reasoned" opinion by identifying "the information and the data upon which the physician relies" and by "explain[ing] conclusions in light of factual premises"); *see* 20 C.F.R. §718.202(a)(4) (a physician's diagnosis of pneumoconiosis must be based on objective medical evidence and supported by a reasoned medical opinion); *Collins v. J & L Steel*, 21 BLR 1-181, 189 (1999); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987).

The administrative law judge next addressed whether employer established rebuttal by proving that "no part 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)(ii); Decision and Order at 23-24. Contrary to employer's contention, having found the opinions of Drs. Thorarinsson and Gaziano to be not probative as to the existence of legal pneumoconiosis, the administrative law judge rationally discounted their opinions relevant to whether the miner's totally disabling respiratory impairment was caused by pneumoconiosis.[12] *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *see also Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 23; Employer's Brief at 17-18. We, therefore, affirm the administrative law judge's determination that employer failed to prove that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis.[13] *See* 20 C.F.R. §718.305(d)(2)(ii).

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[12] Consequently, the administrative law judge's error, if any, in failing to specifically address Dr. Thorarinsson's August 24, 2009 report relevant to the issue of disability causation, is harmless. *See Larioni*, 6 BLR at 1-1278.

[13] Further, in view of employer's affirmative burden of proof on rebuttal, employer's assertion that the administrative law judge was obligated to accept the uncontested medical opinions of Drs. Thorarinsson and Gaziano is meritless. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011); Employer's Brief at 18-19.

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

JONATHAN ROLFE
Administrative Appeals Judge