U.S. Department of Labor

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

BRB No. 14-0324 BLA

EDDIE SMITH Claimant-Respondent v. ANDALEX RESOURCES, INCORPORATED and AMERICAN RESOURCES INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/23/2015 DECISION and ORDER

Appeal of the Decision and Order Award of Benefits in an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

H. Brett Stonecipher and Mark E. Yonts (Fogle Keller Purdy PLLC), Lexington, Kentucky, for employer/carrier.

Rebecca J. Fiebig (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Award of Benefits in an Initial Claim (2011-BLA-5457) of Administrative Law Judge Larry S. Merck (the administrative law judge), 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). The administrative law judge credited claimant with at least twenty-one years of coal mine employment in underground mines or in surface mines under substantially similar conditions; determined that employer is the properly designated responsible operator herein; and adjudicated this claim, filed on April 8, 2010, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b) and, therefore, was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] The administrative law judge further found that employer failed to establish rebuttal of the presumption. Accordingly, benefits were awarded.

On appeal, employer challenges its designation as the responsible operator and the administrative law judge's findings on rebuttal. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to vacate the administrative law judge's responsible operator determination and remand the case for further consideration.[2]

[1] Congress enacted amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this miner's claim, the amendments reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. Under the implementing regulations, once the presumption is invoked, the burden shifts to employer to rebut the presumption by showing that the miner did not have pneumoconiosis, or that no part of his disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(i), (ii).

[2] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established greater than fifteen years of qualifying coal mine employment; the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b); and invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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.[3] 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).

Initially, employer contends that the administrative law judge erred in finding it to be the properly designated responsible operator herein. Employer maintains that liability should have been assessed against claimant's last employer, Ikerd-Bandy Company, Inc. (Ikerd), as either a more recent employer or as a successor operator to employer. Employer's Brief at 4-11. Upon review of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's findings on the responsible operator issue cannot be affirmed.

Employer first argues that the evidence of record establishes that Ikerd should have been held liable for potential benefits as a successor operator pursuant to 20 C.F.R. §725.492(a). Employer maintains that the "unrefuted testimony" of claimant and of employer's former president, Mr. Anderson, establish that employer sold its mining operations to Ikerd in 1993. Employer's Brief at 7-11.

A "successor operator" is defined as "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a). Additionally, Section 725.492(b) states that a successor operator is created when an operator ceases to exist by reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3). In any case in which an operator is a successor operator, any employment with a prior operator shall also be deemed to be employment with the successor operator. 20 C.F.R. §725.493(b)(1).

In determining whether Ikerd was a successor operator to employer, the administrative law judge considered claimant's testimony that "Ikerd was a separate company that acquired the mine where he was working for [employer], and that he was aware of no common ownership," but that "the supervisors remained the same as 'the best I can remember.'" Decision and Order at 8; Director's Exhibit 18-7; Hearing Transcript at 29. The administrative law judge also considered the testimony of Mr.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3; Hearing Transcript at 16.

Anderson that "[employer] might have sold something to Ikerd but I don't remember the terms of the sale." Decision and Order at 8; Employer's Exhibit 10 at 9. Further noting that employer produced no documentary evidence of any business transactions between employer and Ikerd, the administrative law judge determined that "the unsubstantiated testimony of claimant does not establish clear objective evidence of acquired assets or coal mine acquisitions between these companies," and that "there is no indication that claimant, who worked as a tipple operator and prepared coal, has any firsthand knowledge of the business operations or transactions of his former employer." Decision and Order at 8. Thus, the administrative law judge properly found that employer failed to establish a successor relationship between employer and Ikerd, and we affirm this finding, as supported by substantial evidence. Decision and Order at 9. Consequently, we reject employer's assertion that Ikerd should be deemed the responsible operator in this case as a successor operator to employer.

Employer next asserts that claimant worked at least one full year for Ikerd after his employment with employer, and that the administrative law judge misconstrued or ignored relevant evidence in finding less than one year of employment established. Employer maintains that the administrative law judge failed to discuss, analyze, or reconcile his findings and conclusions with the evidence of record. Employer's Brief at 4-11.

To be liable for the payment of benefits as the responsible operator, employer must be the last coal mine operator to have employed the miner for a period of at least one year. 20 C.F.R. §725.494(c). A "year" is defined as "a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32). The designated responsible operator bears the burden of proving, *inter alia*, that a more recent operator employed the miner for at least a year. *See* 20 C.F.R. §725.495(c)(2).

In this case, the administrative law judge addressed whether employer demonstrated that it was not the potentially liable operator that most recently employed claimant for one year. The administrative law judge considered claimant's Social Security Administration (SSA) records, his employment history forms, and his testimony. It is undisputed that claimant worked for employer from 1988 to 1993. The SSA records reflect that claimant subsequently worked for Ikerd in 1994, earning $10,705.31, and in 1995, earning $2,485.71. Director's Exhibits 6, 7. On his employment history form, claimant listed his last employer as Ikerd, working from December 1993 to March 1994. Director's Exhibit 3. Based on claimant's testimony at depositions held on June 18, 2010 and October 22, 2012, and at the December 12, 2012 hearing, the administrative law judge determined that claimant's testimony concerning the length of his employment with Ikerd was "uncertain and inconsistent." Decision and Order at 8. The

administrative law judge found that "claimant is not a good historian of his coal mine employment," noting that "[claimant] testified during his deposition on June 18, 2010, that he believed it was two years, but during his deposition on October 22, 2012, he stated that he probably worked for Ikerd less than a year" and "[a]t the hearing, he testified that he believed it was from December 1993 until March 1994." Decision and Order at 8; Director's Exhibit 18 at 5, 6-7; Employer's Exhibit 12 at 5; Hearing Transcript at 30, 40. The administrative law judge further determined that "Claimant's completed Employment History form and Social Security records do not support a finding that Claimant worked for Ikerd for one year or more." Decision and Order at 8; Director's Exhibits 3, 7. Accordingly, the administrative law judge found that employer failed to produce sufficient evidence to establish that claimant worked for Ikerd for one year or more after his employment with employer. Decision and Order at 8.

We agree with the Director that, while the administrative law judge reasonably accorded little probative weight to claimant's testimony regarding the length of time he worked for Ikerd, *see Miller v. Director, OWCP*, 7 BLR 1-693, 1-694 (1985), the administrative law judge did not make specific findings or explain how he determined that the SSA records, which reflect earnings from Ikerd in 1994 and 1995, do not support a finding of employment for at least one year.[4] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Accordingly, we must vacate the administrative law judge's finding that employer is the properly designated responsible operator, and remand this case for the administrative law judge to reassess the evidence of record; to determine, if possible, the last date of claimant's employment with Ikerd; and to explain with specificity whether the evidence supports a finding that Ikerd employed the miner for a period of at least one year. In determining the length of employment, the administrative law judge may apply any reasonable method of calculation. *See Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-27 (2011); *Clark v. Barnwell Coal Co*., 22 BLR 1-275, 1-280-81 (2003).

Turning to the merits of the case, employer argues that the weight of the evidence establishes the absence of clinical, as well as legal, pneumoconiosis, and that the administrative law judge's weighing of the evidence relevant to this rebuttal method is not supported by substantial evidence or consistent with applicable law. We disagree. In finding that employer failed to disprove the presumed fact of clinical pneumoconiosis, the administrative law judge reviewed the x-ray evidence of record,[5] and determined that

[4] We note that, in the liability analysis contained in his Proposed Decision and Order, the district director determined that claimant's employment with Ikerd ended in March 1994. Director's Exhibits 9, 41.

[5] Dr. Wiot, a physician dually-qualified as a B reader and Board-certified radiologist, interpreted the x-ray dated January 25, 2010 as negative for clinical

the x-rays taken on January 25, 2010, April 23, 2010, and October 18, 2010 were inconclusive, as the dually-qualified Board-certified radiologists and B readers who interpreted these x-rays disagreed as to the presence of clinical pneumoconiosis. The administrative law judge further found that the September 26, 2011 x-ray was positive for pneumoconiosis, as the sole interpretation of this film was positive, and that the November 2, 2011 x-ray was inconclusive, with one positive reading and one negative reading by equally qualified physicians. Decision and Order at 21-22. The administrative law judge rationally concluded that the weight of the x-ray evidence was positive for pneumoconiosis. Decision and Order at 22; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Chaffin v. Peter Cave Coal Co*., 22 BLR 1-294, 1-300 (2003). As an administrative law judge need not assign greater weight to the most recent x-ray evidence, and as x-rays that are inconclusive for pneumoconiosis do not constitute affirmative proof of the absence of clinical pneumoconiosis, we reject employer's argument that the cumulative x-ray evidence is inconclusive, rather than positive, and that it supports a finding of rebuttal at 20 C.F.R. §718.305(d)(1)(i)(B). *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Church v. Eastern Associated Coal Corp*., 20 BLR 1-8 (1996), *modified on recon.*, 21 BLR 1-52 (1997). Turning to the medical opinion evidence, the administrative law judge determined that because Drs. Broudy and Westerfield based their conclusion that

---

pneumoconiosis, Employer's Exhibit 3, while Dr. Alexander, also dually-qualified, interpreted this x-ray as positive for clinical pneumoconiosis. Director's Exhibit 15.

Dr. Baker, a B reader, and Dr. Miller, a dually-qualified physician, interpreted the x-ray dated April 23 2010, as positive for clinical pneumoconiosis, while Dr. Meyer, also dually-qualified, interpreted this x-ray as negative for clinical pneumoconiosis. Employer's Exhibit 2; Director's Exhibits 12, 16.

Dr. Meyer interpreted the x-ray dated October 18, 2010 as negative for clinical pneumoconiosis, while Dr. Miller interpreted this x-ray as positive for clinical pneumoconiosis (1/1). Director's Exhibit 17; Employer's Exhibit 1.

Dr. Alexander interpreted the x-ray dated September 26, 2011 as positive for clinical pneumoconiosis. Claimant's Exhibit 1.

Dr. Meyer interpreted the x-ray dated November 2, 2011 as negative for clinical pneumoconiosis, while Dr. Miller interpreted this x-ray as positive for clinical pneumoconiosis. Claimant's Exhibit 4; Employer's Exhibit 9; Decision and Order at 21-22.

claimant does not have clinical pneumoconiosis on negative x-ray interpretations, contrary to the administrative law judge's findings, their opinions were not well-reasoned and were entitled to little weight. Decision and Order at 23, 25, 28. As substantial evidence supports the administrative law judge's findings, we affirm his conclusion that employer failed to meet its burden of affirmatively proving that claimant does not have clinical pneumoconiosis. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000).

Employer next challenges the administrative law judge's weighing of the opinions of Drs. Broudy and Westerfield in finding them insufficient to rebut the presumed fact of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A). With respect to the opinion of Dr. Broudy,[6] employer asserts that, contrary to the administrative law judge's findings, Dr. Broudy's opinion is consistent with the preamble to the regulations and that he fully explained why he eliminated coal dust exposure as a cause of claimant's impairment. Employer's Brief at 17-19.

In evaluating Dr. Broudy's opinion, the administrative law judge correctly noted that the physician's rationale for attributing all of claimant's obstructive airways disease to cigarette smoking was that "obstructive airways disease is the typical type of impairment associated with cigarette smoking, whereas coal dust exposure usually causes a parallel reduction in the FEV1 and FVC, which results in a restrictive ventilatory defect." Decision and Order at 25; Employer's Exhibit 5 at 4. The administrative law judge permissibly found that Dr. Broudy's opinion, that claimant's disabling obstructive impairment is unrelated to coal mine dust exposure, is "at odds with the Department of Labor's determination that legal pneumoconiosis can involve an obstructive impairment, a restrictive impairment, or both." *See* 20 C.F.R. §718.201(a)(2); Decision and Order at 25, citing 65 Fed. Reg. 79,920, 79,937-39 (Dec. 20, 2000); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Cornett*, 227 F.3d at 576, 22 BLR at 2-121. The administrative law judge rationally concluded, therefore, that Dr. Broudy's opinion on the issue of legal pneumoconiosis was entitled to little probative weight, because the doctor relied on an assumption that is contrary to the medical science credited by the Department, and he failed to adequately explain how he eliminated claimant's coal dust exposure as a causative or aggravating factor in claimant's pulmonary disease and disabling impairment. Thus, the administrative law judge acted

[6] Dr. Broudy diagnosed coronary artery disease, hypertension, hyperlipidemia, obesity, and chronic bronchitis with chronic obstructive airways disease due to smoking. Employer's Exhibit 5. He later testified that "the fact that there has been this apparent significant improvement and then deterioration in lung function suggests that there is some reversibility here which would be most compatible with a diagnosis of an asthmatic condition as well." Employer's Exhibit 7 at 15.

within his discretion in finding that the opinion of Dr. Broudy was insufficiently reasoned and entitled to little weight. Decision and Order on Remand at 38; *see Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-451 (6th Cir. 2013); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc).

Employer next maintains that the administrative law judge selectively summarized Dr. Westerfield's opinion and provided no valid reason for discrediting it. We disagree. In evaluating the opinion, the administrative law judge determined that although Dr. Westerfield[7] acknowledged that pneumoconiosis can progress after exposure to coal dust, he emphasized that claimant stopped mining in 1994 and did not have respiratory problems prior to that time. Further, Dr. Westerfield dismissed claimant's twenty-one years of exposure to coal dust as being "limited,"[8] contrary to the administrative law judge's finding that claimant's employment took place either underground or in conditions substantially similar to those in underground mines.[9] Decision and Order at 26-27; Employer's Exhibit 8 at 20. The administrative law judge acted within his discretion in finding that the opinion of Dr. Westerfield, that claimant does not have legal pneumoconiosis, was based on a premise contrary to the administrative law judge's findings and, thus, was insufficiently reasoned and entitled to little weight. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 330 (6th

[7] Dr. Westerfield attributed claimant's respiratory impairment to asthma, obesity, and congestive heart failure. He opined that coal dust exposure did not cause or aggravate claimant's disabling respiratory impairment. Employer's Exhibits 6, 8.

[8] Dr. Westerfield opined that claimant does not have legal pneumoconiosis, noting that claimant's exposure to coal dust was adequate in a susceptible person. Dr. Westerfield stated that claimant's exposure, "while adequate, is limited," as "[claimant] worked in probably the safest area in coal mining to work in terms of dust causing damage to the lungs." Employer's Exhibit 8 at 20.

[9] The administrative law judge accorded little probative weight to a report authored by Mr. Lamb, an engineer "working with the mining and construction industry," who noted that the job duties described by claimant were duties in and around the preparation and loading facility, and opined that "typically this is one of the more controlled environments on the mine property, as water is typically readily available for dust suppression, the outdoor areas are open to the environment to facilitate natural ventilation, and the control rooms are usually isolated from the facilities and are maintained to protect the occupant and the sensitive equipment housed in the facility." Employer's Exhibit 11; Decision and Order at 11-12.

Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155.

As substantial evidence supports the administrative law judge's credibility determinations, and as employer identifies no error with the administrative law judge's rebuttal findings at 20 C.F.R. §718.305(d)(1)(ii), we affirm his finding that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and we affirm the award of benefits. Because we have vacated the administrative law judge's responsible operator determination, the administrative law judge must transfer liability to the Black Lung Disability Trust Fund if he determines, on remand, that claimant's employment with Ikerd lasted for one year or more, thereby relieving employer from liability. *See England v. Island Creek Coal Co.*, 17 BLR 1-141, 1-145 (1993); *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354, 1-357 (1984).

Accordingly, the administrative law judge's Decision and Order Award of Benefits in an Initial Claim is affirmed on the merits of entitlement, but is affirmed in part and vacated in part on the issue of the responsible operator, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

_____
RYAN GILLIGAN
Administrative Appeals Judge