U.S. Department of Labor

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

BRB No. 16-0499 BLA

BIGE MESSER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ANDALEX RESOURCES, INCORPORATED	)	DATE ISSUED: 06/29/2017
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2012-BLA-05370) of Administrative Law Judge John P. Sellers, III, 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). This case involves a subsequent claim filed on November 12, 2010.[1]

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with 15.33 years of qualifying coal mine employment, and found that the evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the rebuttable presumption that he is totally disabled due to pneumoconiosis and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). 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 finding that claimant established 15.33 years of qualifying coal mine employment and, thus, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer further argues that the administrative law judge erred in finding that employer did not rebut the presumption. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response.[3]

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[1] Claimant's initial claim for benefits, filed on February 1, 2000, was denied by Administrative Law Judge Rudolf L. Jansen on the grounds that claimant failed to establish the existence of pneumoconiosis and disability causation. Director's Exhibit 1-52. By Decision and Order issued on September 30, 2002, the Board affirmed Judge Jansen's denial of benefits. *Messer v. Andalex Resources, Inc.*, BRB No. 02-0376 BLA (Sept. 30, 2002)(unpub.); Director's Exhibit 1-46.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a claimant establishes at least fifteen years in underground coal mine employment, or in surface coal mine employment in conditions substantially similar to those of 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.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14.

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 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 order to invoke the Section 411(c)(4) presumption, claimant must establish that he worked for at least fifteen years in "underground coal mines, or in coal mines other than underground mines in conditions substantially similar to those in underground mines, or in any combination thereof[.]" 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of proof to establish the number of years actually worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). To be credited with a year of coal mine employment, claimant must prove that he worked in or around a coal mine over a period of one calendar year, or partial periods totaling one year, during which he worked for at least 125 working days. *See* 20 C.F.R. §725.101(a)(32). As the regulations only provide limited guidance for the computation of the length of coal mine employment, the Board will uphold the administrative law judge's determination on the length of claimant's coal mine employment if it is based on a "reasonable method" and supported by substantial evidence. *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); *Vickery v. Director, OWCP*, 8 BLR 1-430, 432 (1986).

Employer challenges the administrative law judge's finding that claimant worked for 15.33 years in qualifying coal mine employment, arguing that the administrative law judge did not apply a reasonable method of computation. Employer's Brief at 8-11. Relying on claimant's Social Security Administration (SSA) earnings statement, the administrative law judge found that claimant had a combined total of 15.33 years of underground coal mine employment between 1973 and 1993. Decision and Order at 4-7. The administrative law judge used three different methods of computation in addressing separate periods of claimant's coal mine employment.

For the years prior to 1978, the administrative law judge credited claimant for any quarter in which his SSA itemized earnings statement showed that he earned at least

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

$50.00 in coal mine employment. Decision and Order at 4-5. Finding that the SSA earnings statement showed eleven quarters between 1973 and 1977 where claimant earned more than $50.00, the administrative law judge credited claimant with 2.75 years of qualifying coal mine employment.

For the years 1978, 1981-1987, and 1990-1991, the administrative law judge determined that claimant was continuously employed by a single employer throughout each of these calendar years. Finding that claimant's earnings in each year exceeded the earnings for 125 days of work pursuant to Exhibit 610 of the Office of Workers' Compensation Programs' *Coal Mine* ([*Black Lung Benefits Act*]) *Procedure Manual, Average Earnings of Employees in Coal Mining*, the administrative law judge credited claimant with ten years of qualifying coal mine employment. Decision and Order at 5-6.

Lastly, for the years 1979, 1980, 1988, 1989, 1992, and 1993, where the administrative law judge could not determine the beginning and ending dates of claimant's employment with one or more employers, he divided claimant's total earnings during each year by the yearly wage base for that year, as reported in Exhibit 609 of the *BLBA Procedure Manual.* Decision and Order at 5-7. Based on this formula, the administrative law judge credited claimant with 0.64 years in 1979, 0.67 years in 1980, 0.13 years in 1988, 0.42 years in 1989, 0.57 years in 1992, and 0.14 years in 1993.

After adding the totals for the respective periods together, the administrative law judge determined that claimant worked for a total of 15.33 years in underground coal mine employment. Decision and Order at 7. Finding that claimant established at least fifteen years of qualifying coal mine employment and that claimant had a totally disabling respiratory or pulmonary impairment, the administrative law judge concluded that claimant was entitled to invocation of the Section 411(c)(4) presumption. Decision and Order at 15.

Employer initially argues that it was not rational for the administrative law judge to credit claimant with eleven quarters of coal mine employment for the period between 1973 and 1977. Employer maintains that the administrative law judge should have considered claimant's statement that he worked only during the winter months between 1973 and 1976. Further, employer contends that the administrative law judge ignored the sometimes significant disparity in claimant's earnings from quarter to quarter or from year to year. Employer's Brief at 8-9.

Contrary to employer's argument, for income earned prior to 1978, the Board has long held that it is reasonable for an administrative law judge to credit a miner with a full quarter of employment for each quarter in which the miner's SSA earnings statement shows earnings of $50.00 or more, without any comparison of earnings from quarter to quarter or year to year. *See Clark*, 22 BLR at 1-280-81; *Tackett v. Director, OWCP*, 6

BLR 1-839, 1-841 n.2 (1984). However, as the administrative law judge is tasked with considering all relevant evidence and resolving the conflicts, we agree with employer's argument that he should have addressed and weighed claimant's statements along with the SSA earnings records and any other relevant evidence in this case.

Employer next contends that the administrative law judge erred in crediting claimant with full years of employment in 1978, 1981-1987, and 1990-1991, where he found that claimant's earnings in each year exceeded the earnings for 125 days of work set out in Exhibit 610. Employer's Brief at 9-10. We disagree. While employer relies on *Clark* for the proposition that a mere showing of 125 working days does not establish one year of coal mine employment, the administrative law judge's findings are consistent with the two-step inquiry of *Clark*: He first determined that claimant worked continuously for an entire calendar year with an employer, and then consulted the table at Exhibit 610 to determine whether claimant's employment was regular, *i.e.*, that claimant actually worked as a miner for 125 days during the one-year period. Decision and Order at 5-6; *see Clark*, 22 BLR at 1-280. As substantial evidence supports the administrative law judge's findings, we affirm his decision to credit claimant with ten years of qualifying coal mine employment for the years 1978, 1981-1987, and 1990-1991.

We agree with employer, however, that the administrative law judge's application of the third method of computation for the years 1979, 1980, 1988, 1989, 1992, and 1993 cannot be upheld. The regulations provide that, if the beginning and ending dates of the miner's employment cannot be ascertained, the administrative law judge may, in his discretion, determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics at Exhibit 610. *See* 20 C.F.R. §725.101(a)(32)(iii). In this case, the administrative law judge incorrectly used the yearly wage base, as reported in Exhibit 609, as the denominator in his calculations. Since Exhibit 609 sets out the *annual* limit on income subject to Social Security tax in all occupations, a wage base that is not specific to the coal mine industry, whereas Exhibit 610 contains the coal mine industry's *daily* earnings data referenced in 20 C.F.R. §725.101(a)(32)(iii), the administrative law judge's method of computation was not reasonable for these years. *See Osborne v. Eagle Coal Co.*, BLR , BRB No. 15-0275 BLA, slip op. at 8-9 (Oct. 5, 2016). Thus, we vacate the administrative law judge's finding of 15.33 years of qualifying coal mine employment and remand this case for further consideration.

On remand, however, the administrative law judge is not required to use the daily wage column at Exhibit 610, described at 20 C.F.R. §725.101(a)(32)(iii). Rather, the use of this table is discretionary, and the administrative law judge may find the dates and length of employment established "by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and

sworn testimony." *See* 20 C.F.R. §725.101(a)(32)(ii). Consequently, the administrative law judge should consider all the relevant evidence of record, not merely the SSA earnings statement, to determine the length of claimant's coal mine employment.

As we have vacated the administrative law judge's finding of at least fifteen years of qualifying coal mine employment, we must also vacate his findings that claimant invoked the Section 411(c)(4) presumption and that he demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309. On remand, the administrative law judge may use any reasonable method of computation in determining the length of claimant's coal mine employment, consistent with the instructions herein. *See Muncy*, 25 BLR at 1-27; *Clark*, 22 BLR at 1-280; *Kephart*, 8 BLR at 1-186. If the administrative law judge again finds fifteen or more years of qualifying employment established, claimant will be entitled to invocation of the Section 411(c)(4) presumption. If claimant fails to establish at least fifteen years of qualifying coal mine employment, the administrative law judge must adjudicate the claim with the burden on claimant to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), disability causation pursuant to 20 C.F.R. §718.204(c), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

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

In the interest of judicial economy, we will address employer's contention that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, in the event that claimant again establishes invocation of the presumption. Upon invocation of the Section 411(c)(4) presumption, the burden shifts to employer to rebut the presumption by establishing that claimant does not have either legal or clinical pneumoconiosis, 20 C.F.R. §718.305(d)(1)(i), or by establishing 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). In this case, the administrative law judge found that employer failed to establish rebuttal by either method.

In finding that employer failed to disprove the existence of legal pneumoconiosis,[5] the administrative law judge considered the opinion of Dr. Jarboe, who diagnosed chronic bronchitis, bronchial asthma, hypertension, and significant obesity, but opined that

[5] "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).

claimant did not suffer from legal pneumoconiosis.[6] Director's Exhibit 13; Employer's Exhibit 3. Instead, Dr. Jarboe concluded that claimant's totally disabling pulmonary impairment resulted from a combination of smoking, reactive airways disease, and obesity. *Id*. The administrative law judge discredited Dr. Jarboe's opinion because he found that it was unpersuasive and not well-reasoned. Decision and Order at 19-21.

Employer contends that the administrative law judge placed undue reliance on precedent and the preamble to the 2001 regulations in discounting the medical opinion of Dr. Jarboe. Employer's Brief at 14-20. Employer also asserts that the administrative law judge misapplied the preamble, thereby depriving employer of a fair hearing and rendering the presumption irrebuttable. *Id*. at 18-20. We disagree.

We reject employer's argument that, in evaluating the credibility of Dr. Jarboe's opinion, the administrative law judge erred in relying on the studies cited by the Department of Labor (DOL) in the preamble to the 2001 regulations. *See A&E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). Rather, the administrative law judge permissibly consulted the preamble as a statement of the medical science found credible by DOL when it revised the definition of legal pneumoconiosis to include obstructive impairments arising out of coal mine employment. The administrative law judge permissibly evaluated Dr. Jarboe's opinion in light of those studies. *Adams*, 694 F.3d at 801, 25 BLR at 2-210. Contrary to employer's contention, the administrative law judge's references to the preamble thus did not convert the rebuttable presumption of Section 411(c)(4) into an irrebuttable presumption or deny employer a fair adjudication. *Id.*

[6] The administrative law judge also considered Dr. Baker's diagnosis of legal pneumoconiosis and found that the opinion did not assist employer in rebutting the Section 411(c)(4) presumption. Decision and Order at 21; Director's Exhibit 12. The administrative law judge further noted that the record contains medical opinions from Drs. Broudy, Dahhan, and Jarboe, submitted in connection with claimant's original claim filed on February 1, 2000. However, the administrative law judge reasonably relied upon the more recent medical evidence, which he found more accurately reflected claimant's current condition. *See Cooley v. Island Creek Coal Co*., 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988) (holding that it is illogical to find rebuttal established based on evidence that predates the evidence on which invocation is based); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985); Decision and Order at 21.

The administrative law judge determined that Dr. Jarboe relied upon a study indicating that miners have shown very minor elevations of residual volume as a basis to conclude that claimant's greatly elevated residual volume is inconsistent with an obstructive impairment caused by coal dust inhalation. Decision and Order at 19-20; Director's Exhibit 13 at 15-16. While Dr. Jarboe attributed claimant's "striking increase" in residual volume to cigarette smoking and reactive airways disease, the administrative law judge permissibly discounted his opinion because the physician failed to explain why the entire increase in residual volume was not due even in part to coal dust exposure. Decision and Order at 19-20; *see A & E Coal Co. v. Adams*, 694 F.3d 798, 802-03, 25 BLR 2-203, 2-210-12 (6th Cir. 2012); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

Moreover, in light of Dr. Jarboe's failure to adequately explain why none of claimant's increased residual volume could have been associated with coal dust exposure, the administrative law judge found that Dr. Jarboe's opinion fails to adequately address the DOL's position, as set forth in the preamble, that the risks associated with smoking and coal dust exposure are additive when combined in a miner who smokes. Decision and Order at 19-20; *see* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000). Consequently, the administrative law judge permissibly discredited Dr. Jarboe's opinion because the physician did not adequately explain why claimant's coal mine dust exposure does not contribute, along with cigarette smoking, to his obstructive impairment. *See* 20 C.F.R. §718.201(a)(2); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *see also Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, BLR (10th Cir. 2017).

Similarly, noting Dr. Jarboe's opinion that he could exclude coal dust exposure as a cause of claimant's chronic bronchitis because it had been more than eighteen years since claimant's coal mine employment had ended, the administrative law judge permissibly found that this reasoning is inconsistent with the regulations, which recognize that pneumoconiosis may be latent and progressive, and "may first become detectable only after a miner ceases being exposed to coal mine dust." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 739, 25 BLR 2-675, 2-685-86 (6th Cir. 2014); Decision and Order 20-21; Director's Exhibit 13 at 17.

The administrative law judge additionally determined that Dr. Jarboe excluded a diagnosis of legal pneumoconiosis based, in part, on claimant's response to bronchodilators on pulmonary function testing. Decision and Order at 19; Director's Exhibit 13 at 15. Noting that some reversibility on pulmonary function testing following the administration of bronchodilators does not preclude the presence of pneumoconiosis, and permissibly relying on binding precedent in *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007), the administrative law judge found that Dr.

Jarboe failed to adequately explain why a response to bronchodilators necessarily eliminated a finding of legal pneumoconiosis. Decision and Order at 19; *see Barrett*, 478 F.3d at 356, 23 BLR at 2-483.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73, 25 BLR 2-431, 2-446-47 (6th Cir. 2013); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). As the administrative law judge provided valid bases for discrediting the opinion of Dr. Jarboe, the only opinion supportive of employer's burden, we affirm his finding that employer failed to disprove the existence of legal pneumoconiosis.[7] *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). Accordingly, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.[8] *See* 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether employer could establish rebuttal by showing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 21-22. The administrative law judge rationally discounted Dr. Jarboe's opinion because the physician did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the presence of the disease. *See Ogle*, 737 F.3d at 1074, 25 BLR at 2-451-52; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); *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 21-22. We

[7] As the administrative law judge provided multiple valid reasons for discounting Dr. Jarboe's opinion, we need not address employer's remaining arguments regarding the administrative law judge's weighing of the opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[8] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Therefore, we need not address employer's contentions of error regarding the administrative law judge's finding that employer also failed to disprove the existence of clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278.

therefore affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption that claimant is totally disabled due to pneumoconiosis. If, on remand, the administrative law judge again finds that claimant invoked the Section 411(c)(4) presumption, he may reinstate his award of benefits. If the presumption is not invoked, the administrative law judge must adjudicate the claim with the burden on claimant to establish the existence of pneumoconiosis and disability causation.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge